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The Implementation of the EC Milk Quota Regulations in British, French and German Law

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1 direct sales, to which the same principles apply, are not treated, however, are referred to where necessary

2 direct sales are not treated. Except for the choice of the Formulas, the same principles apply for them; see Blumann, C.; Lusson-Lerousseau, N., JurisClasseur rural, vol. 3, Fasc. D-1, p. 6

3 only deliveries to dairies are treated

4 The specific regulations concerning the milk quota system in the new "Länder" and direct sales are not explored

Abbreviations

All ER:	All England Law Reports
BFH:	Bundesfinanzhof (Federal Financial Court)
BGB:	Bürgerliches Gesetzbuch (civil code)
BGBl. I:	Bundesgesetzblatt I (Journal of Federal Laws and Regulations)
BGH:	Bundesgerichtshof (Federal Civil Court)
BVerwG:	Bundesverwaltungsgericht (Federal Administrative Court)
BVerwGE:	Entscheidungssammlung des Bundesverwaltungsgerichts (Law Reports of the Federal Administrative Court)
CAP:	Common Agricultural Policy
C.M.L. Rev.:	Common Market Law Review
C.M.L.R.:	Common Market Law Reports
CNIEL:	Centre national interprofessionnel de l'économie laitière
DBV:	Deutscher Bauernverband (German producers' association)
D.D.A.F.:	Directions départementales de l'Agriculture et de la Forêt
DPQR:	Dairy Produce Quotas Regulations
EAGGF:	European Agricultural Guarantee and Guidance Fund
ECJ:	European Court of Justice
E.C.R.:	European Court Reports
EG:	Estates Gazette
et al:	et alii
et seq:	et sequens
Fasc.:	Fascicule
FNIL:	Fédération Nationale de l'Industrie Laitière
FNPA:	Fédération Nationale de la Propriété Agricole
FNPL:	Fédération Nationale des Producteurs de Lait
FNSEA:	Fédération Nationale des Syndicats d'Exploitants Agricoles
IBAP:	Intervention Board for Agricultural Produce
J. O.:	Journal Officiel de la République Française
LS Gaz:	The Law Society's Gazette
MAFF:	Ministry of Agriculture, Fisheries and Food
MCAs:	Monetary Compensatory Amounts

MGVO (now MGV):	Milch-Garantiemengen-Verordnung
MMB:	Milk Marketing Board
MOG:	Gesetz zur Durchführung der Gemeinsamen Marktorganisationen
N.I.L.Q.:	Northern Ireland Legal Quarterly
No.:	Numéro
No:	Number
O. J.:	Official Journal of the European Communities
OLG:	Oberlandesgericht (superior civil court)
ONILAIT:	Office national interprofessionnel du lait et des produits laitiers
OVG:	Oberverwaltungsgericht (superior administrative court)
para:	paragraph
QB:	Queen's Bench Division
Rec.:	Recueil
Rép. min.:	Réponse ministrielle
resp:	respectively
s:	section
Sch:	Schedule
VG:	Verwaltungsgericht (administrative court)
vol.:	volume
ZaÖRV:	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZMP:	Zentrale Markt- und Preisberichtstelle für Erzeugnisse der Land- Forst- und Ernährungswirtschaft GmbH

The Implementation of the EC Milk Quota Regulations in British, French and German Law

HEIKE GEHRKE

Introduction

Scope for research

"Milk can only be produced by a milk-giving cow". This sophisticated statement was the essential reasoning of a judgement by the German Federal Administrative Court contemplating the phenomenon of milk quotas[1].

Milk quotas linked to a levy system were introduced by the Council of the European Communities on the dairy sector in 1984[2]. By the system, a levy is imposed on every litre of milk or milk products marketed in the European Community and exceeding during a twelve-month-period a so-called reference quantity[3] ("quota"). The system was originally meant to last for five years until 1989, but in 1988, it was extended to another three years until the 31st of March 1992[4]. In November 1991, the Commission submitted proposals to again extend the system over another eight years with significant reforms[5]. In March 1992, the milk quota system was prolonged for another twelve-month period up to March

1 BVerwG, (1990) Agrarrecht, p. 57

2 Council Regulation 856/84, O. J. 1984, L 90/10 amending Council Regulation 804/68 on the common organization of the market in milk and milk products, O. J. 1968, L 148/13

3 Art. 5 (c) (1) of Council Regulation 804/68, as amended by Council Regulation 856/84, O. J. 1984, L 90/10

4 Council Regulation 1109/88, O. J. 1988, L 110/27

5 COM (91) 409 final (implementing five proposals set out in COM (91) 258 final, p. 20 et seq)

1993[6] and in June 1992, the agreed reform on the CAP (Common Agricultural Policy) envisaged the maintenance of milk quotas for another period of seven years[7]. The Council passed reformed rules in December 1992[8].

The milk quota Regulation was introduced to correct the increasing imbalance between offer and demand on the European dairy market which was causing enormous structural surplus on this sector[9]. Between 1973 and 1981, milk deliveries grew at 2,5 % per annum increasing to over 3,5 % in 1983, while internal consumption of milk and milk products grew at only O,5 % per annum[10]. Since 1974, the EEC has been self-sufficient as far as milk and milk products are concerned[11]. In 1983, there was a degree of self-sufficiency of 122 % for milk and milk products in the EEC dairy sector[12]. Stocks of butter and skimmed milk powder increased reaching their peak in 1976, declining for a short period and in 1982, the stocks of skimmed milk powder began to build up again[13]. In 1981, about 42 % and in 1983, about 27, 6 % of the expenditure of the European Agricultural Guarantee and Guidance Fund (EAGGF), Guarantee Section was spent on the milk sector[14]. The dairy sector thus proved to be the most expensive commodity sector in the Community[15].

One of the reasons for the increasing deliveries to dairies is the rise of the average yield per cow due to improvements of quality and age structure of herds (because of genetic process) and due to increased efficiency

6 Council Regulation 816/92, O. J. 1992, L 86/83

7 Council Regulation 2074/92, O. J. 1992, L 215/69

8 Council Regulation 3950/92, O. J. 1992, L 405/1, the reformed rules are not considered. The basis of the research will be the rules up to January 1992, both in the Member States and the Community

9 See Preamble of Council Regulation 856/84, O. J. 1984, L 9O/1O; Sorasio, D., (1985) Revue du marché commun, No 291, p. 533

10 Court of Auditors, Special Report No 2/87, O. J. 1987, C 266 /3

11 Commission of the European Communities, The Agricultural Situation in the Community, 1984 Report, p. 52; Court of Auditors, Special Report No 2/87, O. J. 1987, C 266 /3

12 for butter 145 % and for skimmed milk powder 129 %, Bundesregierung (ed.), Agrarbericht 1985, p. 62

13 Harris, S.; Swinbank, A.; Wilkinson, G., The Food and Farm Policies of the European Community, p. 105

14 Commission of the European Communities, The Agricultural Situation in the Community, 1982 Report, p. 144; 1984 Report, p. 270

15 see Gomoll, E., (1985) Recht der Landwirtschaft, p. 31

in production, especially as far as techniques of feeding and use of concentrated feedingstuffs are concerned[16]. At the same time, internal and external consumption stagnated because of the saturation of the consumption of milk and milk products[17].

The negligence of the demand by the producers is to a high extent due to the relatively high target and intervention prices for milk and milk prices which are yearly agreed upon by the Council[18]. The realisation of the target price is ensured by the instruments of the common organization of the market in milk and milk products[19], namely the guaranteed price support system[20]. The level of prices agreed upon only aimed at guaranteeing sufficient incomes to the producers[21]. Price policy has been the predominant instrument of the CAP in comparison to structural policy, which is enshrined in Art. 39 (1) (a), (2) of the EEC Treaty[22].

16 Commission of the European Communities, The Agricultural Situation in the Community, 1984 Report, p. 48; Stolwijk, H. J. J. , A simple model of the EC dairy market, p. 1; Sorasio, D., (1985) Revue du marché commun 1985, No 291, p. 534, Footnote 2, partly due to Community modernization programs

17 Stolwijk, H. J. J., A simple model of the EC dairy market, p. 1; Commission of the European Communities, Milk, The Quota System, (1984) 203 Green Europe, p. 4

18 Wissenschaftlicher Beirat beim Bundesministerium für Ernährung, Landwirtschaft und Forsten, Milchmarktpolitik, p. 1 et seq, encouraging efficient farmers to increase their milk production capacity and less efficient ones to continue at their level of production; see Council Regulation 804/68, O. J. 1968, L 148/13

19 Council Regulation 804/68, O. J. 1968, L 148/13, amending Council Regulation 13/64, O. J. 1964, L 34, p. 549/64 that set out the fundamental principles of the dairy regime, but did not yet contain a unified price system; Harris, S.; Swinbank, A.; Wilkinson, G., ibid, p. 94, Snyder, F. G., Law of the Common Agricultural Policy, p. 83

20 The common organization of the market in milk and milk products is, together with the common organizations of the market in cereals and sugar, supposed to be one of the organizations providing a complete price guarantee; see, Jegouzo, Y., Agriculture, Régime administratif général, Juris-Classeur administratif, vol. 4, Fasc. 358, p. 21; other categories of common market organizations are those providing partial price guarantees and those without price guarantees; see Snyder, F. G., Law of the Common Agricultural Policy, p. 73

21 Wissenschaftlicher Beirat beim Bundesministerium für Ernährung, Landwirtschaft und Forsten, Milchmarktpolitik, p. 1 ; Harris, S.; Swinbank, A.; Wilkinson, G.; The Food and Farm Policies of the European Community, p. 96; Boest, R., Die Agrarmärkte im Recht der EWG, p. 178; Sorasio, D., (1985) Revue du marché commun, No 291, p. 534

22 Pearce, J., The Common Agricultural Policy, in: Wallace, H.; Wallace, H.; Webb, C. (eds.), Policy Making in the European Community, p. 147; Harris, S.; Swinbank, A.; Wilkinson, G., The Food and Farm Policies of the European Community, p. 37

Remedies to stem overproduction have been taken since the 1970s. Both voluntary measures like programs to relate milk production closer to demand with the help of premiums for non-marketing of milk and compensation for the conversion to beef and sheep production[23] or actions taken to maintain and strengthen the demand by finding new outlets for the products[24] and compulsory measures like the co-responsibility levy[25] and last but not least, the establishment of a guarantee threshold in 1982[26], were not deterrent enough to correct the structural imbalance[27]. The reason is that the high level of prices has never been reduced[28] and any proposals in this respect encountered fierce resistance from the dairy lobby[29]. Because of the prices, it was still more attractive to produce milk in spite of the co-responsibility levy[30] and the guarantee threshold[31]. The importance of the dairy sector in the agricultural economies of the Member States and the social needs of the peripheral regions where livestock farming is virtually the only possible activity[32] account for the Council's reluctance to adpot any significant measures[33]. In particular, the entirely diverse milk production structure in the Member States with regard to the average yield per cow and the size of dairy farms seems to have prevented any effective reform[34].

23 Commission of the European Communities, Milk, The Quota System, (1984) 203 Green Europe, p. 3 et seq; Harris, S.; Swinbank, A.; Wilkinson, G., ibid, p. 104

24 for a survey see Harris, S.; Swinbank, A., Wilkinson, G., ibid, p. 100 et seq

25 Council Regulation 1079/77, O. J. 1977, L 131/6; the levy initially amounted to 1,5 % of the target price; Bergmann, D.; Baudin, P., Politiques d'avenir de l'Europe agricole, p. 94, 96

26 Council Regulation 1183/82, O. J. 1982, L 140/1. This threshold was calculated according to the deliveries of milk in 1981 plus O,5 % and could be increased yearly. If the threshold was exceeded, appropriate measures would be taken to offset the additional expenditure

27 Commission of the European Communities, Milk, The Quota System, (1984) 203 Green Europe, p. 4

28 Usher, J. A., Legal Aspects of Agriculture in the European Community, p. 74

29 Josling, T. E.; Moyer, W. H., Agricultural Policy Reform, p. 70

30 Usher, J.A., Legal Aspects of Agriculture in the European Community, p. 74

31 Gomoll, E., (1985) Recht der Landwirtschaft, p. 31

32 Boest, R., Die Agrarmärkte im Recht der EWG, p. 31

33 Harris, S.; Swinbank, A.; Wilkinson, G., The Food and Farm Policies of the European Community, p. 104

34 Harvey, D. R., Milk quotas, p. 13 et seq; Schumann, W., EG-Forschung und Policy-Analyse, p. 74; Snyder, F. G., Law of the Common Agricultural Policy, p. 144 et seq; for figures see Harris, S.; Swinbank, A.; Wilkinson, G., ibid, p. 93

In June 1983, the Commission was authorized by the Council to propose new measures to cope with the overproduction in the milk sector[35]. The EEC found itself in a budget crisis because of the milk surplus[36]. In a number of Member States, farm incomes were still declining[37]. The Commission estimated that a milk price reduction of 12 % during the campaign lasting from 1984 to 1985 would be necessary to compensate for the expected exceeding of the guarantee threshold[38]. Such a price reduction would result in grievous and immediate consequences on the producers' incomes without immediately reducing the production[39] and thus be politically unenforcable. The Commission also rejected a differentiated increase in the co-responsibility levy. In order to be effective both financially and socially, the differences between smaller and bigger producers would have had to be so great that it would have led to unacceptable inequalities among Member States with diverse production structures[40].

Therefore, the Commission proposed that the system of the guarantee threshold be maintained but ensured by a milk quota system and related to a restrictive price policy[41]. Quotas had the advantage that production could be curbed immediately. They would also safeguard farmers' incomes. In addition, they would not disadvantage countries with more efficient milk production structures as the differentiated co-repsonsibility levy does[42]. The disadvantage of quotas is that production structures are frozen and that the competitive capacity of the European dairy sector with regard to the world market would suffer[43].

35 Bonnafous, P., L'incidence des quotas, p. 22

36 Josling, T. E., Moyer, W. H., Agricultural Policy Reform, p. 66 et seq, p. 7O

37 Josling, T. E., Moyer, W. H., Agricultural Policy Reform, p. 67

38 COM (83) 500 final

39 Commission of the European Communities, Milk, The Quota System, (1984) 203 Green Europe, p. 7

40 Petit, M. et al, Agricultural policy formation in the European Community, p. 125; COM (83) 500 final, p. 21; Harvey, D. R., Milk quotas, p. 20; these proposals were especially rejected by the British, de Salis, W., (1984) 36 Country Landowner, No. 7, p. 8

41 COM (83) 500 final; for draft regulations see COM (83) 548 final; for the decision making process within the Commission, DG-VI, see Josling, T. E.; Moyer, W. H., Agricultural Policy Reform, p. 71 et seq

42 Hairy, D.; Perraud, D., Crise et transformations de la politique laitière, in: Coulomb, P. et al (eds.), p. 87; in particular the UK, the Netherlands, Denmark

43 European Parliament, Resolution of 11 October 1985, Doc. A 2-85/85, O. J. 1985, C 288/150; Harvey, D. R., Milk quotas, p. 51

Dramatic negotiations at every level and in every hour followed the Commission's proposals[44]. At the Athens summit in 1983 no solution could be found because of the opposition of the French government. The Commission submitted revised proposals[45]. On the Brussels summit on the 31st of March 1984, the Council finally decided to introduce the milk quota system[46].

To sum up, the introduction of milk quotas is a political compromise worked out by the Member States in order to limit the development of budget expenses without decreasing farmers' incomes too much[47]. It was decided under the pressure of necessity because the future of the common organization of the market in milk and milk products was endangered.

The implementation of the EEC milk quota Regulations in the Member States demanded, despite their legal nature as Regulations (Art. 189 of the EEC Treaty), detailed national rules. This was mainly due to the wide discretion, namely the choice between two Formulas (Formula A and B) in order to implement the system, that the vague Regulations left to the Member States[48]. The application and impacts of the milk quota Regulations were strikingly different in some Member States. In Germany, for example, the authorities exceeded the national quota when allocating quotas to producers whereas the French and British authorities managed not to exceed their quotas. In the United Kingdom a veritable

44 for detailed discussion on the "five stages" of negotiations the milk quota proposals and the other 1983 proposals went through till they were finally approved see Petit, M. et al, Agricultural policy formation in the European Community, p. 28 et seq

45 revised draft regulations, see COM (84) 190 final

46 Council Regulation 856/84, O. J. 1984, L 90/10 and Council Regulation 857/84, O. J. 1984, L 90/13. The action of establishing dairy quotas was taken along with a package of other measures including in particular the dismantling of positive Monetary Compensatory Amounts (MCAs) and a shift to a new agricultural unit of account (or green ECU) based on the Deutschmark and the reduction of the UK contribution burden; Josling, T. E.; Moyer, W. H., Agricultural Policy Reform, p. 66; Gomoll, E., (1985) Recht der Landwirtschaft, p. 31

47 Preamble of Council Regulation 856/84; Boussard, J. M., (1985) 12 European Review of Agricultural Economics, p. 325; Ehle, D., Abgaben und Erstattungen, in: Kruse, H. W. (ed.), Zölle, p. 243; Wissenschaftlicher Beirat beim Bundesministerium für Ernährung, Landwirtschaft und Forsten, Milchmarktpolitik, p. 3; Sorasio, D., (1985) Revue du marché commun, No 291, p. 534; Gadbin, D., (1985) Revue de droit rural, No 138, p. 509; Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 5; Harvey, D. R., Milk quotas, p. 9

48 see Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 5; Sorasio, D., (1988) Revue du marché commun 1988, No 313, p. 535

market of quotas developed what was not the case in France and Germany.

From these facts, the idea of comparing the different implementations of the milk quota Regulations into British, French and German law arose.

The German regulation is compared with the French and British ones mainly because the French and British legislator chose Formula B, whereas the German legislator opted for Formula A. Though France chose the same Formula as Britain, the administration of milk quotas in Britain proved to be more effective[49]. Because the German milk production structures are similar to those of France and are unlike Britain, the question arises whether the same difficulties occurred despite the different Formulas. Moreover, the British legal system belongs to the so-called Common law family and the German and French system belong to the Romano-Germanic law family[50]. Last but not least, in all three countries, milk is the most important single product in agriculture. In 1983, the percentage of value of the dairy production of national agricultural production was 27, 5 % in Germany, 22, 9 % in the UK and 17, 7 % in France[51]. Germany, France and the UK produce the highest share of milk production in the Community. In 1983, the percentage of the value of dairy production in the EEC amounted to 23, 3 % in Germany, to 23, 0 % in France and to 15, 6 % in the UK[52].

But what is the purpose of comparing implementation of CAP into national law?

The purpose when comparing the implementation of the milk quota Regulations in the different national systems is to ascertain whether the Community objectives enshrined in the Regulations were attained and what differences in implementation occurred and why.

The milk quota Regulations have had two main objectives[53]: The immediate objective is that the overproduction in the dairy sector shall be reduced in the short time in order to stabilize the financial resources of

49 Hélin, F., (1987) Revue de droit rural, No 158, p. 468 et seq

50 David, R.; Brierley, J. E. C., Major legal systems, p. 22

51 Commission of the European Communities, The Agricultural Situation in the Community, 1985 Report, p. 198

52 Commission of the European Communities, The Agricultural Situation in the Community, 1985 Report, p. 200

53 Preamble of Council Regulation 856/84, O. J. 1984, L 90/10; Art. 5 (c) (1) of Council Regulation 804/68, as amended by Council Regulation 856/84, O. J. 1984, L 90/10; Bonnafous, P., L'incidence des quotas, p. 23

the Community and to regulate the European dairy market. In the long run, however, the Regulations seek to restructure the dairy sector.

Since 1984, the Regulations have been amended several times, also in order to not endanger the immediate target of the Regulations[54]. In particular in 1986/87, the dairy quota system had to be tightened up because increasing surplus resulted in another crisis in the sector[55]. In addition, the system of intervention support in the dairy sector has not only been limited in time but also in quantity[56]. However, since 1985 it has been necessary to create a certain flexibility (for example leasing and regional and national equalization[57]) of the quota system to take into account different production structures in certain Member States and, thus, to enable the efficient working of the system[58].

From the perspective of 1992, the immediate objective of the European milk quota Regulations, as enshrined in the initial Regulations, has only been partially achieved. The milk market has been stabilized but in 1991, there was still a degree of self-sufficiency of 110,7 % for milk and milk products[59]. In the seven twelve-month periods up to 1990/91, the national quotas have been consistently exceeded by an average of 0,9 %, except for the first campaign[60]. The budget costs for the milk sector have been reduced from 27,6 % in 1983 to 17,5 % in 1991[61] of the spendings of the EAGGF, but in 1991, the dairy sector accounted still for the most expensive sector. The quotas fixed for 1984/85 and for the subsequent years

54 Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 5; ONILAIT, Quotas laitiers, un bilan, p. 4; for the February 1985 and December 1986 changes see Schumann, W., EG-Forschung und Policy-Analyse, p. 128, p. 153

55 Blumann, C.; Lusson-Lerousseau, N., ibid., p. 5; Neville-Rolfe, E., British Agricultural Policy, in: Britton, D. (ed.), Agriculture in Britain, p. 184; Oskam, A. J. et al, The superlevy - Is there an alternative?, p. 31; Bundesregierung (ed.): Agrarbericht 1988, p. 76

56 Usher, J. A., Legal Aspects of Agriculture in the European Community, p. 72; Sorasio, D., (1988) Revue du marché commun, No 313, p. 19

57 for details see second chapter

58 Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 5

59 Bundesregierung (ed.), Agrarbericht 1992, p. 95

60 CNIEL, L' économie laitière en chiffres, édition 1991, p. 115 et seq

61 Commission of the European Communities, The Agricultural Situation in the Community, 1991 Report, T/87

still exceeded the actual demand for milk and milk products[62]. In June 1992, the Agricultural Ministers decided to prolong the quota system and to cut the quotas in 1993/94 and 1994/95 if necessary[63]. A significant price cut which was proposed by the Commission[64] has not been agreed upon in the dairy sector[65].

This research, however, does not attempt to find an answer as to whether and why the two immediate objectives of the EEC Regulations have been reached or to conclude which of the three Member States considered contributed most to the success or failure of the quota system. This can only be indirectly deduced from the national reports. But, rather, more detailed targets and objectives enshrined in the Regulations will be scrutinized. It will be asked whether in the three Member States considered, the following four objectives were achieved[66]:

the objective pursued when granting the choice between two Formulas

the target not to exceed the national guaranteed quantity when allocating reference quantities

the objective of avoiding the rise of a market of quotas

the intention to consider difficult economic and social situations of tenants

In answering these questions, apart from the actual application of the Regulations and investigations in its legality, both the different national legal systems and the national social, economic and political context concerning the agricultural sector will necessarily be revealed. This revelation is important because all of these differences deeply affect the outcome and implementation of EEC policies[67]. And what is more, only if

62 Bundesregierung (ed.), Agrarbericht 1984, p. 61, Agra-Europe 42/83, Europa-Nachrichten, p. 17; Neville-Rolfe, E., British Agricultural Policy, in : Britton, D. (ed.), Agriculture in Britain, p. 184

63 Council Regulation 2074/92, O. J. 1992, L 215/69

64 see COM (91) 100 final, COM (91) 258/1-3 final; von Urff, W., Agrar- und Fischereipolitik, in: Weidenfeld, W.; Wessels, W. (eds.), Jahrbuch der Europäischen Integration 1991/92, p. 108

65 Regulation 2072/92, O. J. 1992, L 215/65 envisaging only a slight reduction of the intervention price for butter and some Italian cheeses from 1993 onwards

66 the objectives will be explained in detail in the third chapter

67 Hoetjes, B. J. S., Policy making and policy implementation in European Agriculture, in: Hoetjes, B. J. S.; Desideri, C. (eds.), Changing agriculture in Europe, p. 8 et seq; Hendriks, G., Germany and European Integration, p. 229; for differerent agricultural legal structures in the Member states see Pikalo, A. Agrarrechtsvergleichung, in: Handwörterbuch des Agrarrechts, vol. 1, column 95

these differences in the Member States are known, can demands for harmonization or other Community measures such as improvements of the implementation or of the implemented program be formulated[68]. Thus, this comparative research mainly concentrates on what is known to be the main goal of comparative law: the gaining of knowledge[69]. Moreover, the degree of importance of the various reasons (legal, social, economic and political) for differences in the implementation process, can be judged.

However, it must be pointed out that the scope of this research is limited in two respects. First of all, it is limited to a special area of Community law, the CAP, and, within the CAP, the milk quota Regulation. Secondly, a thorough insight into all factors determining implementation processes cannot be given; the main emphasis will be put on the legal aspects of the implementation because of limitations of space.

But why compare agricultural policies and law[70]? European agriculture and food policies account for over 80 % of European legislation and judicial decisions[71]. Agriculture is supposed to be the most integrated sector in the Community[72]. Despite this fact, government and administration in the area of agriculture at the international, national and sub-national level, to mention only one example, has been a grossly neglected field of study in public administration[73]. Studies of implementation of CAP Regulations are of great value[74], in particular because the legal framework for implementing agricultural policies in the Member States is strikingly different in some fields of law. For example, the horizontal and

68 Hoetjes, B. J. S., ibid, p. 8

69 Zweigert, K., Rechtsvergleichung, in : Strupp, K.; Schlochauer, H. J. (eds.), Wörterbuch des Völkerrechts, vol. 3, p. 80; for agricultural comparative law see Pikalo, A., Agrarrechtsvergleichung, in: Handwörterbuch des Agrarrechts, vol. 1, column 95

70 By agricultural law, we mean the whole law dealing with agriculture, either public or private law. Private law involves the agricultural tenancies law, family and inheritance law affecting agricultural holdings and consolidation of farmland. Public law, on the other hand, means economic law, including the common organizations of the market and other EEC instruments, see Pikalo, A., (1967) Recht der Landwirtschaft, p. 255

71 Snyder, F. G., New directions in European Community Law, p. 19

72 Gilsdorf, P.; Priebe, R., Introduction to Art. 38 EWGV, in: Grabitz, E. (ed.), Kommentar zum EWG-Vertrag, Annotation 28

73 Leemans, A. F., Preface, in: Hoetjes, B. J. S., Desiderie, C. (eds.), Changing agriculture in Europe, p. iii

74 Leemans, A. F., ibid, p. iii

vertical models of integration of the profession vary in the Member States[75]. Another example are the different agricultural tenancies laws in the Member States.

Plan:

In order to find out whether the Community objectives could have been achieved and find reasons for differences that occurred in the implementation of the milk quota Regulations, the thesis will be structured as follows:

In the first chapter, the general framework of the research will be explained, taking into account the implementation research in legal and political sciences and defining a method for the comparative part.

Because of its highly technical provisions, the milk quota system envisaged by the European Regulations will be explained in the second chapter. Like this, the objectives defined above are clarified.

In the third, fourth and fifth chapters, the implementation in the British, French and German legal systems will be presented with relation to the Community objectives defined. Separate reports for each country will be offered, because the details of the national application can only be understood if the whole national system is explained[76]. The order of the national reports does not follow any rules.

In the final chapter, the comparison is being conducted, followed by the conclusions.

75 see e.g. in French law, Lorvellec, L., Droit rural, p. 352 et seq; p. 411 et seq

76 see for example Schmidt, F., in: Festschrift für Zweigert, p. 530

Chapter I

Framework for the Research of Comparison of Implementations

A. Framework for implementation research

The purpose of the research is to discover whether some of the objectives of the EEC milk quota Regulations have been fulfilled and what differences in the implementation of the milk quota Regulations emerged and why. Ascertaining whether objectives have been attained is the immediate practical interest in case studies of the so-called implementation research. The goal of the implementation research has always been to find out whether a program was successful or not, i.e. whether the manifested objectives have been achieved and what obstacles or difficulties arose in the implementation[77]. The remote goal of implementation research is to deduce patterns according to which implementation processes proceed[78].

It will be defined what implementation means (I.) and to which methods implementation research in general is subject (II.). Finally, it will be revealed how the implementation of the milk quota Regulations will be studied (III.)

77 Jones, C. O., An introduction to the study of public policy, p. 165; Clune III, W., H.; Lindquist, R. H., (1981) Wisconsin Law Review, p. 1094, 1105; Elmore, R. F., (1978-79) 94 Political Science Quarterly, No. 4, p. 603; for Community law see Schwarze, J., Foreword, in : Schwarze, J.; Pollack, C.; Becker, U. (eds.), The 1992 challenge at national level, p. 11 et seq, Ehlermann, C.-D., Opening speech, in: Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1, p. 143; Ziller, J., The Implementation of European Community Policies, in: Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1, p. 135

78 Wollmann, H., Implementationsforschung, in: Nohlen, D.; Schultze, R.-O. (eds.), Politikwissenschaft, Theorien, Methoden, Begriffe, vol. 1, p. 355

I. Definition of implementation

Implementation means the process of accomplishing political objectives and programmes through the politico-administrative system[79]. More detailed, implementation is the general term for all activities of inferior administrative bodies such as the application of laws, regulations, rules and other measures[80]. In a broader sense implementation is the process and art of deliberately achieving social change through law[81].

The implementation phase is one of three phases in the political process of problem-solving. These three phases can be distinguished as follows:[82]

- the phase of policy-formulation, in which expressed needs, proposals or demands are transformed either into programmes binding on the State or into legal rules. In Community law, in particular legal acts like Regulations and Directives are the output of this phase;
- the phase of implementation including, in Community law, firstly the incorporation phase, which means the transposition of a legal act into the law of the Member States and secondly the enforcement by the national administrations and court control[83]. For incorporation and administrative enforcement, the term application can be used as well;

79 Siedentopf, H.; Hauschild, C., The implementation of Community legislation by the Member States, in: Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1, p. 5

80 Wollmann, H.; Implementationsforschung, in: Nohlen, D.; Schultze, R.-O. (eds.), Politikwissenschaft, Theorien, Methoden, Begriffe, vol. 1, p. 355; for Community law see Usher, J. A., Legal Aspects of Agriculture in the European Community, p. 163; Boest, R., Die Agrarmärkte im Recht der EWG, p. 285; Oppermann, T., Europarecht, p. 202

81 Clune III, W. H., Lindquist, R. E., (1981) Wisconsin Law Review, p. 1045, this definition must be understood in relation to the beginnings of implementation research in the 1960s and 1970s in the United States, where implementation research focused on ambitious reforming social programs for education, housing etc.

82 Siedentopf, H.; Hauschild, C., The implementation of Community legislation by the Member States, in: Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1, p. 5, 26, for Community Law;
Mayntz, R., Implementation politischer Programme, in: Mayntz, R. (ed.), p. 238 et seq; Clune III, W. H.; Lindquist, R. E., ibid, p. 1085, 1079. This standard framework of policy analysis is called "forward mapping" because the analyst begins with an objective and examines whether the objective has been carried through, as opposed to "backward mapping". Backward mapping analysis would start with the last stage by asking what the needs of the recipients are and the resources and structures of the administration and then finally formulate objectives, see Elmore, R. F., (1978-79) 94 Political Science Quarterly, No. 4, p. 604 et seq

83 see Siedentopf, H.; Hauschild, C., The implementation of Community legislation by the Member States, in: Siedentopf, H.; Ziller, J. (eds.), Making European

- the impacts of implemented programmes or rules, impacts here meaning reactions of the recipients of administrative action.

However, these distinctions are somewhat artificial because the phases are interdependent[84]. In particular, the reactions of recipients of administrative actions are closely linked to administrative enforcement since the enforcement depends on their reactions and vice versa[85].

II. Method of implementation research

Implementation research is an empirical political and administrative study[86]. It is usually carried out by descriptive case studies[87].

Failures of programmes are, according to the findings of many case studies on implementation, either due to insufficient formulations in the programmes or to deficiencies in the organization of the implementers or to the characteristics of the recipients of administrative action or to all of these three reasons[88]. Case studies thus focus on all the three phases distinguished above. Before defining the scope of the implementation research of this thesis, a short summary of which factors of each of the phases are usually scrutinized in case studies and of the reasons therof will be given.

1. Policy-formulation phase

Policy-making at the European level does not take place in isolation from the national level. Both levels interact involving national and re-

Policies Work, vol. 1, p. 42, 57; Wessels, W., Hrbek, R., in: Azzi, G. C. (ed.), L'application du droit communautaire, p. 33

84 Siedentopf, H.; Hauschild, C., ibid, p. 42; Wollmann, H., Implementationsforschung, in: Nohlen, D.; Schultze, R.-O. (eds.), Politikwissenschaft, Theorien, Methoden, Begriffe, vol. 1, p. 355; Mayntz, R., Implementation politischer Programme, in: Mayntz, R. (ed.), p. 239

85 Siedentopf, H.; Hauschild, C., ibid, p. 57 et seq.

86 see Wollmann, H., ibid, p. 355

87 see Elmore, R.F., (1978-79) 94 Political Science Quarterly, No. 4, p. 601; examples for Community law: Hoetjes, B. J. S., Desideri, C. (eds.), Changing Agriculture in Europe; Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1 and 2; Azzi, G. C. (ed.), L'application du droit communautaire

88 Mayntz, R., Soziologie der öffentlichen Verwaltung, p. 218; Wollmann, H., Implementationsforschung, in: Nohlen, D.; Schultze, R.-O. (eds.), Politikwissenschaft, Theorien, Methoden, Begriffe, vol. 1, p. 355; Jones, C. O., An introduction to the study of public policy, p. 166; Elmore, R. F., (1978) 26 Public policy, No. 2, p. 186 et seq

gional governments and administration, Community officials and non-governmental national and European interest groups in every phase of the policy-formulation process[89]. This kind of policy-formulation is called either "joint decision making"[90] or "two-tier policy making"[91]. Though policy-formulation at the European level is, according to the Treaty, carefully divided between the Commission whose function it is to submit or withdraw proposals[92] and the Council which passes legal acts[93], the influence of the Council and the Member States has increased over the last years at the expense of the powers of the Commission[94]. In fact, the real actors in the policy-formulation phase, in particular in the CAP, are the Member States and the various interest groups[95]. Because the actors have different conceptions of the legislative process, these conceptions shape the various proposals for the legislation and its eventual outcome[96]. The resulting Regulations and Directives hence incorporate a collection of concessions, derogations and compromises[97].

The diverse conceptions adopted by the actors during the policy-formulation phase may determine their behaviour when Community law is implemented[98]. Since some actors of the policy-formulation phase even apply the passed legal acts the consideration of the policy-formulation phase is of great value for the implementation research.

89 Feld, J. W., The Two-Tier Policy Making in the EC, in: Hurwitz, L. (ed.), Contemporary Perspectives on European Integration, p. 132

90 see Scharpf, F. W., (1988) 66 Public Administration, p. 239 et seq

91 Feld, J. W., ibid, p. 123

92 see Art. 149 of the EEC Treaty

93 see Art. 149 of the EEC Treaty

94 Feld, J. W., ibid, p. 133; Siedentopf, H.; Hauschild, C., The implementation of Community legislation by the Member States, in: Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1, p. 73 et seq

95 Hendriks, G., Germany and European Integration, p. 229; Feld, J. W., ibid, p. 136; Pearce, J., The Common Agricultural Policy, in: Wallace, H.; Wallace, W.; Webb, C. (eds.), Policy Making in the European Community, p. 157, 171

96 Snyder, F. G., New Directions in European Community Law, p. 17

97 Pearce, J., ibid, p. 153; Feld, J. W., The Two-Tier Policy Making in the EC, in: Hurwitz, L. (ed.), Contemporary Perspectives on European Integration, p. 147; Glaesner, H.-J., Encadrement communautaire de la transposition du droit européen, in: Schwarze, J. et al, (eds.) The 1992 Challenge at National Level, p. 17

98 Siedentopf, H.; Hauschild, C., The implementation of Community legislation by the Member States, in: Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1, p. 3, p. 65; Azzi, G. C., Conclusions comparatives, in: Azzi, G. C. (ed.), L'application du droit communautaire, p. 354

Case studies inquire in particular into the interaction between the various actors and levels in the process of policy-formulation (so-called "politics") or into the institutional framework of this process (so-called "polity")[99] or into the conceptions adopted by the actors.

2. Implementation phase

As far as the implementation phase is concerned, case studies investigate into how the structures, organizations and co-ordinations of the implementers, namely administrative bodies but also societal organizations and parliaments, influence the process of implementation and thus success of a programme[100]. In particular, the administrative structure is studied, including the politico-administrative culture[101], the role and behaviour of bureaucrats and their attitudes towards Community law[102]. In studies of Community law, the control of the compliance of the incorporation and the enforcement by adminstrative agencies with Community law is ascertained[103]. The implementation phase is seen as crucial for the success or failure of a programme because administrative actions determine the outcome of programmes to a large degree[104].

3. Impacts of implemented programmes

The reaction of the recipients might influence the behaviour of the administration. Their structure, their economic status in the sector considered, their interaction with the administration and their attitude to-

99 for definition of polity and politics; see Schumann, W., EG-Forschung und Policy-Analyse, p. 6; 20; Jann, W., (1983) Aus Politik und Zeitgeschichte, B 47, p. 26 et seq

100 Mayntz, R., Soziologie der öffentlichen Verwaltung, p. 218; examples are case studies see Hoetjes, B. J. S., Policy making and policy implementation, in: Hoetjes, B. J. S., Desideri, C. (eds.), Changing Agriculture in Europe, p. 4 et seq; Azzi, G. C., Conclusions comparatives, in: Azzi, G. C. (ed.), L'application du droit communautaire, p. 343 et seq

101 in comparative researches see for example Siedentopf, H.; Hauschild, C., The implementation of Community legislation by the Member States, in: Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1, p. 6 et seq

102 if the research concerns Community law; see Azzi, G. C., Conclusions comparatives, in : Azzi, G. C. (ed.), L'application du droit communautaire, p. 348 et seq

103 Azzi, G. C., Introduction, in: Azzi, G. C. (ed.), L'application du droit communautaire, p. 10

104 Mayntz, R., Implementation politischer Programme, in: Mayntz, R. (ed.), p. 240

wards the administration are thus studied[105]. Recipients may be private individuals and/or organized interest groups[106].

To sum up, implementation research is carried out through case studies and it is mostly conducted in a descriptive way[107]. However, there is no common framework allowing for the inclusion in the implementation research of factors and processes (e.g. socio-economic conditions) that might influence an implementation process nor which impacts of implemented programs (all outcomes like micro- or macroeconomic effects or limited to compliance and non-compliance with the law) should be investigated into[108]. The factors included in the implementation research concerning the milk quota Regulations are yet to be specified.

III. Framework for implementation research

All the three phases should, for the reasons mentioned under II. 1., 2., 3., be considered in this research to a certain extent. The extent of this consideration is yet to be defined.

It will be shown which aspects of the policy-formulation phase should be considered (1 b)). Because insufficiencies of a programme are supposed to be one reason for the failure, it should be outlined which legal rules determine the policy-formulation phase. Thus, it can be ascertained whether the Council acted legally when passing the milk quota Regulations (1 a)).

The implementation phase and the impacts of implemented programmes will be treated as interdependent for the reasons given under I. Which aspects of both phases should be considered will be described under 2 b). The application of Community law and its control, which were both defined as being part of the implementation phase, is subject to certain legal principles. Because this research focuses mainly on the legal reasons for the success or failure of the fulfillemt of objectives of the

105 Wollmann, H., Implementationsforschung, in: Nohlen, D.; Schultze, R.-O. (eds.), Politikwissenschaft, Theorien, Methoden, Begriffe, vol. 1, p. 356; Hoetjes, B. J. S., Policy making and policy implementation, in: Hoetjes, B. J. S.; Desideri, C. (eds.), Changing Agriculture in Europe, p. 7

106 see Hoetjes, B. J. S., ibid, p. 7

107 see Elmore, R. F., (1978-79) 94 Political Science Quarterly, No. 4, p. 601

108 see Clune III, W. H.; Lindquist, R. E., (1981) Wisconsin Law Review, p. 1044 et seq

milk quota Regulations, these rules should be explained and they have to be kept in mind when inquiring into the implementation phase (2.a)).

1. Policy-formulation phase

a) Limitations the Council is subject to when passing EEC Regulations[109]

The Council enjoys considerable discretion when elaborating Community Regulations[110]. It is, however, subject to the principle of the uniformity of the market and is required to create equal conditions of competition[111].

In detail, the limitations of the Council are of a formal and material nature. The procedure leading to the enactment of a Regulation must be according to the procedural rules envisaged by the EEC Treaty[112]. As far as the contents of CAP Regulations are concerned, the Council is bound by the objectives of Art. 39 of the EEC Treaty[113]. Moreover, the Council has to guarantee the principle of non-discrimination enshrined in Art. 40 of the EEC Treaty. The prohibition of discrimination is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law[114]. That principle precludes comparable situations from being treated differently unless the difference in treatment is objectively justified. Last but not least, the Council has to respect the principle of proportionality and the fundamental rights[115].

109 the applying measures the Commission passes are also subject to the same principles as the Council, moreover, the Commission may only act within the authorized delegation of the Council, see Usher, J. A., Legal Aspects of Agriculture in the European Community, p. 145 et seq

110 e.g. Case 197-200, 243, 245 + 247/8O Ludwigshafener Walzmühle v Council and Commission [1981] E.C.R., p. 3211 (3251); Gilsdorf, P.; Priebe, R., Art. 39 EWGV, in: Grabitz, E. (ed.), Kommentar zum EWG-Vertrag, Annotation 2, 3

111 Boest, R. Die Agrarmärkte im Recht der EWG, p. 286 and 282; Blumental, M., (1984) 35 N.I.L.Q., p. 36; Case 23/75 Rey Soda v Cassa Conguaglio Zucchero [1975] E.C.R., p. 1279 (1304)

112 Schwarze, J., Europäisches Verwaltungsrecht, vol. 1, p. 383 et seq

113 Gilsdorf, P.; Priebe, R., Art. 39 EWGV, in: Grabitz, E. (ed.), Kommentar zum EWG-Vertrag, Annotation 1, 6

114 Case C-267-285/88 Wuidart et al v Laiterie coopérative eupenoise et al [1990] E.C.R., p. I-435 (I-480)

115 see Schwarze, J., Europäisches Verwaltungsrecht, vol. 1, p. 4O1 et seq; Case 44/79 Hauer v Land Rheinland-Pfalz [1979] E.C.R., p. 3727 (3745); Blumental, M., (1984) 35 N.I.L.Q., p. 36

b) Policy-formulation phase

The investigation of the policy-formulation phase is necessarily limited to a few crucial points because the scope of the research does not allow, focused as it is on the legal aspects, the space to show all divergent interests concerning the introduction of the milk quotas or even the reforms of the quota system. In particular, the interaction between the various actors in the process of policy-formulation on the European and national level and the institutional framework of this process has not been considered[116].

As seen under II. 1., the real actors in the integration process of the CAP are not the common institutions, but the Member States[117]. Hence, the national agricultural policies deserve more attention because the differences in agricultural policies deeply affect the outcome and implementation of EEC policies[118]. That is why a brief summary of the Member States' conceptions of the agricultural policy in general and on the dairy sector in particular will be made. In this context, reference will be made to the Member States' attitude towards the introduction of milk quotas. The policy pursued by the Member States with regard to the dairy sector subject to quantitive restrictions is, for the purpose of this research, called national quota policy. The revelation of the national quota policies is necessary in order to ascertain whether the Member States' policy complied with the objectives enshrined in the European Regulations. Although a national quota policy is only a conglomerate of the various interest groups' policies (such as producers' organizations, interprofessional organizations, manufacturers and traders), the study must because of limitations of space restrict itself to the comparison of national quota policies excluding regional or professional policies within each of the

116 as to this see in detail: Petit, M. et al, Agricultural Policy Formation in the European Community, p. 42 et seq, p. 79 et seq

117 Hendriks, G., Germany and European Integration, p. 229; Feld, J. W., The Two-Tier Policy Making in the EC, in: Hurwitz, L. (ed.), Contemporary Perspectives on European Integration, p. 136; Pearce, J., The Common Agricultural Policy, in: Wallace, H.; Wallace, W.; Webb, C. (eds.) Policy Making in the European Community, p. 157, 171

118 Pearce, J., ibid, p. 153; Hoetjes, B. J. S., Policy making and policy implementation in European Agriculture, in: Hoetjes, B. J. S., Desideri, C. (eds.), Changing Agriculture in Europe, p. 8 et seq; Hendriks, G., ibid, p. 229; Feld, J. W., ibid, p. 137

Member States[119]. This is also justified by the fact that national policies are an outcome of these diverse policies. Where necessary, however, reference is made to regional diversities within the Member States and to the attitude of some of the organizations (see national reports).

Moreover, as far as the agricultural policy of the Community is concerned, in order to understand the national agricultural policies pursued, the necessary economic and social context of the issues at stake is of vital importance[120]. The measures taken in order to reduce surplus failed also because of the diverse milk production structures in the EEC. The revelation of the dairy structures of the Member States thus is of vital importance. In order to shed light on the socio-economic context for both the policy pursued on the dairy sector and the application of the EEC Regulations, socio-structural data of the dairy sector are given including some general data of the agricultural sector[121] (see national reports[122]).

2. Implementation phase and impacts of programmes

a) Legal rules governing the application and control of Community law

When Community law is supposed to be implemented, the question arises as to which institution is competent for the implementation and to which principles Member States are subject when they apply Community acts (aa). The application of Community Regulations is subject to judicial control by both the European Court of Justice (ECJ) and national courts (bb).

119 see in detail for the attitudes of interest groups in France, Germany and the UK as to the quota system, Petit, M. et al, Agricultural policy formation in the European Community, p. 37 et seq, p. 53 et seq, p. 97 et seq

120 see Pearce, J., ibid, p. 153, see Snyder, F. G., New Directions in European Community Law, p. 14, 19, 31; see Ziller, J., The Implementation of European Community Policies, in: Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1, p. 142; see Butt Philip, A., The application of the Transport Regulations, in: Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1, p. 119

121 as far as Germany is concerned, the five new "Bundesländer" are excluded, due to lack of sufficient data. The general data on agriculture are from 1983/84, the years before and in which the milk quota Regulations were introduced. Most of the data on dairy farming, however, are from both 1983/84 and 1989/1990/1991 to enable a comparison. Data from 1991 were in most cases not yet available.

122 for convenience, the data will be presented in a comparative form in the relevant context

aa) Competence for implementation of Community law and limitations the Member States are subject to

Either Community bodies or the Member States could be competent for implementing Community law[123]. Since the Treaty contains no provisions for any division of competence[124], the distinction must be made as follows : Community bodies are competent as soon as they are explicitly attributed any competence by Community law, as, for example, the Commission[125]. In all other cases, the Member States are obliged to implement Community law because of their duties enshrined in Art. 5 of the EEC Treaty[126]. In practice, Community law is to a large extent applied by Member States[127]. This is also true for the implementation of the CAP[128].

The application of Community law by the Member States is governed by two main principles: The first principle is the so-called institutional autonomy (1). The application also depends on the nature of the legal act, in particular on whether a Regulation or Directive has to be applied (2). The second principle is not to modify or reduce the scope of Community law when applying it (3).

(1) Determination of competent authorities and procedural rules (institutional autonomy)

Community Regulations may expressly disallow the Member States to divide the responsibility for taking the necessary executing measures among diverse national institutions[129]. But if Community law has no provisions regulating competence, the Member States autonomously decide which administrative institutions are responsible for applying the Community Regulations at the national level[130] (institutional autonomy).

123 Oppermann, T., Europarecht, p. 202

124 Oppermann, T., Europarecht, p. 202

125 Art. 155, 145 of the EEC Treaty, Nicolaysen, G., Europarecht I, p. 75

126 Oppermann, T., Europarecht, p. 202; Götz, V., (1986) Europarecht, p. 35; Case 205-215/82, Deutsche Milchkontor et al v Federal Republic of Germany [1983] E.C.R., p. 2633 (2665); Cartou, L., Communautées européennes, p. 199

127 for a survey see Oppermann, T., Europarecht, p. 202

128 Snyder, F. G., Law of the Common Agricultural Policy, p. 60; Schwarze, J., Europäisches Verwaltungsrecht, vol. 1, p. 438

129 Case 240/78 Atlanta Amsterdam BV v Produktschap voor Vee en Vlees [1979] E.C.R., p. 2137 (2148)

130 Case 51-54/71 International Fruit Company v Produktschap voor Groenten en Fruit [1971] E.C.R., p. 1107 (1116); Case 31/78 Bussone v Italian Ministry of

These decisions also depend on the constitutional and administrative structures of the several Member States[131]. This autonomy is also true for the control of the application of Community law[132] and for the decision to which procedural rules their administrative agencies are subject[133].

(2) National incorporating measures in the case of implementation of Regulations and Directives

As far as the incorporation of legal acts of the Community is concerned, a distinction must be made between Regulations and Directives as the main important instruments of secondary Community law[134]. Directives require national re-enactment though it is recognized by the ECJ that a Directive might also have direct effect after the time-limit for its incorporation has expired[135]. By definition, an EEC Regulation is directly applicable throughout the Community and its terms therefore do not need national re-enactment[136]. That is why the ECJ has held that Regulations must not receive national re-enactment since the Community law origin of the legislation might thereby be disguised and the general application be endangered[137]. Nevertheless, there are many Community Regulations which expressly or implicitly require domestic ancillary or

Agriculture [1978] E.C.R., p. 2429 (2442); Schwarze, J., Europäisches Verwaltungs recht, vol. 1, p. 442; Oppermann, T., Europarecht, p. 2O4; Götz, V., (1986) Europarecht, p. 42

131 Case 51-54/71, International Fruit Company v Produktschap voor Groenten en Fruit [1971] E.C.R., p. 1107 (1116)

132 Usher, J. A., Legal Aspects of Agriculture in the European Community, p. 163

133 Schwarze, J., Europäisches Verwaltungsrecht, vol. 1, p. 444; Oppermann, T., Europarecht, p. 2O4; Case 205-215/82, Deutsche Milchkontor et al v Federal Republic of Germany [1983] E.C.R., p. 2633 (2665); Case 51-54/71 International Fruit Company v Produktschap voor Groenten en Fruit [1971] E.C.R., p. 1107 (1116); Case 39/7O Norddeutsches Vieh-und Fleischkontor GmbH v HZA Hamburg-St. Annen [1971] E.C.R., p. 49 (58); Usher, J. A., Legal Aspects of Agriculture in the European Community, p. 163; see Lasok, D.; Bridge, J. W., Law & Institutions of the European Communities, p. 323

134 By secondary Community law, the law enacted by the institutions of the Community on the basis of the treaties, like Directives and Regulations according to Art. 189 of the EEC Treaty is meant. It opposes primary Community law, mainly the treaties of the EEC, the ECSC and the EAC. (see Schweitzer, M.; Hummer, W., Europarecht, p. 47 et seq)

135 Case 148/78 Ratti [1979] E.C.R., p. 1629 (1642)

136 Art. 189 of the EEC Treaty

137 Case 34/73 Variola v Italian Finance Administration [1973] E.C.R., p. 981 (991); Usher, J. A., Legal Aspects of Agriculture in the European Community, p. 155

implementing legislation[138]. The ECJ has ruled that provisions that explicitly authorize a Member State to enact incorporating measures are not contradicting the direct effect of Regulations[139]. Moreover, according to the ECJ, Member States are competent and are obliged under Art. 5 of the EEC Treaty to enact incorporating measures if any practical application of the Community Regulation requires changes in national law in order to achieve the stated objectives[140].

(3) Competences and limitations of Member States when implementing Community law

The implementation of Community law is subject to certain limitations because uniform application of Community law must be guaranteed in order to avoid any unequal treatment of citizens[141]. These limitations were elaborated by the ECJ on the basis of the principle which is enshrined in Art. 5 of the EEC treaty: generally speaking, implementing Member States may not reduce the scope nor modify the application of Community provisions[142]. Community law application and national law application should not be treated differently[143]. In particular, Member States are subject to the general principles of Community law in order to

138 Case 31/78, Bussone v Italian Ministry of Agriculture [1978] E.C.R., p. 2429 (2445); Glaesner, H.-J., Encadrement communautaire de la transposition du droit européen, in: Schwarze, J. et al (eds.), The 1992 Challenge at National Level, p. 17; Usher, J. A., Legal Aspects of Agriculture in the European Community, p. 155, Capotorti, F., Legal Problems of Directives, Regulations and their Implementation, in: Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1, p. 164

139 see Case 230/78, S.p.A. Eridania and others v Ministry of Agriculture [1979] E.C.R., p. 2749 (2771)

140 Case 31/69, Commission v Italian Republic [1970] E.C.R., p. 25 (34); see Glaesner, H.-J., ibid, p. 17; Boulouis, J., Droit institutionnel des communautés européennes, p. 183

141 Schwarze, J., Europäisches Verwaltungsrecht, vol. 1, p. 46O; Case 2O5-215/82 Deutsche Milchkontor et al v Federal Republic of Germany [1983] E.C.R. 2633 (2665); Oppermann, T., Europarecht, p. 206

142 Case 265/78 Ferwerda BV v Produktshap voor Vee en Vlees [198O] E.C.R. 617 (630); Case 205-215/82 Deutsche Milchkontor et al v Federal Republic of Germany [1983] E.C.R., p. 2633 (2666); Snyder, F. G., Law of the Common Agricultural Policy, p. 60

143 Case 205-215/82 Deutsche Milchkontor et al v Federal Republic of Germany [1983] E.C.R., p. 2633 (2666)

avoid jeopardizing the objectives of the Treaty[144]. In detail, Member States are subject to two important principles. Firstly, they are obliged to obey the principle of non-discrimination. The principle enshrined in Art. 4O (3) of the EEC Treaty applies both to measures enacted by the Council and to implementing measures of the Member States[145]. Secondly, the requirements of the protection of fundamental rights, which form an integral part of the general principles of Community law[146], are binding not only on the Council but also on the Member States when they apply Community rules[147].

bb) Judicial mechanisms for the control of the application of Community law

The application of Community law is mainly controlled in two ways[148]: Firstly, the Commission or one Member State may according to Art. 169, 170 of the EEC Treaty institute infringement proceedings against another Member State. Before the Commission and Member States may bring the matter before the ECJ, however, non-judicial proceedings have to be carried out. The control by infringement proceedings is a centralized control mechanism[149]. Secondly, single citizens and private enterprises may evoke control of the application of Community law by appealing to national courts. This right stems from the principle of pri-

144 Schweitzer, M.; Hummer, W., Europarecht, p. 126; Case 77/76 Cucchi v Avez S.p.A [1977] E.C.R., p. 987 (1004); Case 36/79 Denakavit v Finanzamt Wahrendorf [1979] E.C.R., p. 3439 (3456)

145 Case 139/77 Denkavit v Finanzamt Wahrendorf [1978] E.C.R., p. 1317 (1333); Case 213- 215/81 Norddeutsches Vieh-und Fleischkontor v Bundesanstalt f. landwirtschaftliche Marktordnung [1982] E.C.R., p. 3583 (3600); Case 201-202/85 Klensch v Secrétaire d'Etat à l'Agriculture et à la Viticulture [1986] E.C.R., p. 3477 (3507); Kummer, H.-W., Art. 40 EWGV, in: von der Groeben, H.; Thiesing, J.; Ehlermann, C.-D. (eds.), Kommentar zum EWG-Vertrag, vol. 1, Annotation 47

146 Case 44/79 Hauer v Land Rheinland-Pfalz [1979] E.C.R., p. 3727 (3745)

147 Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1988] E.C.R., p. 2609 (2639 et seq)

148 Ehlermann, C.-D., Opening Speech, in: Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1, p. 145; other mechanisms are non-judicial controls like information, approvement, cooperation see Art. 33, 6, 42, 213, 220 of the EEC Treaty, see Cartou, L., Communautés européennes, p. 192

149 Ehlermann, C.-D., ibid, p. 145; see also Art. 173 (2), 178, 215 of the EEC Treaty

macy and direct applicability of Community law[150]. This control is called the decentralized control mechanism[151].

The power of the ECJ to give preliminary rulings according to Art. 177 of the EEC Treaty is by contrast only an indirect control. The ECJ is not actually called upon to control the concrete measures for implementation, but to specify the meaning and scope of the obligations of Community law to which all implementation procedures are connected[152].

b) Framework for implementation phase and the phase of impacts of implemented programmes

The factors that will be included in the case study are chosen with relation to the four EEC objectives[153]:

Each report will start with describing by which legal act the EEC Regulations were incorporated into national law. Secondly, the administrative bodies or other organizations to which competences have been attributed will be presented. Their legal status within the administration of the Member States will be given. Thus, the fact that the choice of the executing organ has an effect on how law is applied is recognized[154]. Only by understanding how organizations work and which competences they have can we understand how policies are shaped in the process of implementation[155].

Thirdly, it will be asked how the European Regulations with regard to their objectives were incorporated. In detail, it will be asked how the rules on the allocation of reference quantities were transposed into the national systems, which Formula was incorporated and how the transfer rules were transposed. Moreover, the question arises, how the rules con-

150 Boulouis, J., Droit institutionnel des communautés européennes, p. 184; Case 26/62 van Gend en Loos v Niederländische Finanzverwaltung [1963], E.C.R., p. 1 (25 et seq); Case 6/64 Costa v E.N.E.L. [1964] E.C.R., p. 1259 (1269 et seq)

151 Ehlermann, C.-D., ibid, p. 145

152 Capotorti, F., Legal Problems of Directives, Regulations and their Implementation, in: Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1, p. 166

153 see introduction for definition

154 Harmathy, A., The influence of legal systems on models of implementation, in: Daintith, T. (ed.), Law as an Instrument of Economic policy, p. 266 ; Jones, C. O., An introduction to the study of public policy, p. 173, p. 176; Elmore, R. F., (1978) 26 Public Policy, No. 2, p. 187; see Siedentopf, H.; Hauschild, C., The implementation of Community legislation by the Member States, in: Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1, p. 26

155 see Elmore, R. F., ibid, p. 187

sidering the economic and social situations of the tenants were transposed. To this purpose, the agricultural tenancies laws of the Member States and the legal nature of the reference quantity must be referred to. The incorporation phase is considered because it can thus be ascertained whether legal differences in both the incorporated rules and the existing Member States law influenced the divergency of the implementations.

When presenting the incorporation of the rules, their enforcement by the administration and other implementers as well as their control by the courts and Community institutions will be considered if necessary. Thus, it can be discovered whether the achievement of the goals was hindered or promoted by the administration and the courts. Though the organization and co-ordination between the various implementers will be inquired into, a thorough insight into the structures of the implementers such as their attitude to Community law or the role of bureaucrats will not be given.

As far as the impacts of implemented programs are concerned, it will be investigated whether the behaviour of the recipients who are the producers and purchasers was in compliance with the EEC Regulations and the national regulations as far as the transfer rules and the implementation of the Formula is concerned. Thus, it can be ascertained whether their reactions contributed to the success or failure of the objectives defined. As far as economic effects[156] are concerned, the question as to whether a market of quotas developed will be scrutinized.

B. Method of the comparison of the implementations

In order to find out for what reasons the Community objetives were fulfilled or not both the incorporation of the milk quota Regulations into national law and their application by administrative bodies including the reactions of the recipients will be compared. By comparing legal institutions and specific problems, a microcomparison will be carried out[157]. The question is to which method this comparison is subject.

156 economic effects of quotas can be micro-economic effects such as the behaviour of the farmers (increasing the average yield per cow) or macro-economic effects such as the impact of quotas on landprices or agricultural structure, for details see Boussard, J. M., (1985) 12 European Review of Agricultural Economics, p. 325

157 see Zweigert, K.; Kötz, H., Introduction to comparative law, vol. 1, p. 5

One broadly acknowledged method of comparative law is that of functionality[158]. This essentially means that in order to find out how a foreign legal system has solved a concrete problem, one must identify those rules of a foreign system which are functionally equivalent to those of the interested party's native law, taking into account both legal and non-legal factors. To this end, all national legal dogmatism and technical terms must be abandoned in order to directly concentrate on the function of a legal or non-legal instrument, i.e. their impact on society[159]. In this way, it is possible to avoid the danger of basing one's comparison on the concepts of one's own legal order and thus of attempting to compare two things that strictly speaking are not comparable[160]. The basic rule of the "functionalist" approach is that the different legal systems give the same or very similar solutions, even in detail, to the same problems and needs of life[161].

The "functionalist" method is criticized because it leaves out all non-legal factors that influence a problem-solving process such as the administrative behaviour, the role of actors such as interest groups and the economic and social context by believing that law is functional. Because of these non-legal factors, however, the same needs can lead to different solutions[162]. In particular, this method does not take into account diversity of societies and thus wrongly assumes that the legal and societal problems and hence needs are the same in all countries[163].

Even if one assumes that the functionalist method may, for purely technical reasons, have its merits in private law, it is probably not very suitable for public law. By public law we mean those rules that concern the relationship of an individual to the state and the relationship between the holders of public power, which, of course, include administrative and constitutional law[164]. The subject matter of the milk quota Regulation

158 Zweigert, K.; Kötz, H., Introduction to comparative law, vol. 1, p. 31; Münch, F., (1973) ZaÖRV 1973, p. 139 et seq

159 Schmidt, F., in: Festschrift für Zweigert, p. 532

160 Zweigert, K.; Kötz, H., ibid, p. 31

161 Zweigert, K.; Kötz, H., ibid, p.36

162 Schmidt, F., in: Festschrift für Zweigert, p. 528

163 Schmidt, F., in: Festschrift für Zweigert, p. 528; Constantinesco, L.-J., Rechtsvergleichung, vol. 3, p. 54

164 Zweigert, K.; Kötz, H., ibid, p. 31; Katz, A., Staatsrecht, p. 6

belongs partly to the administration of levies, though there are also some private law regulations.

Public law reflects the ideology, national moral concepts and politics of a state[165]. Because public law is influenced greatly by political concepts and economic interests, the exploration of the broader context of a rule of public law cannot be neglected when comparing public law[166]. But, on the other hand, the comparison of public law is not identical with political sciences. Political sciences consider all factors determining policies, the legal factor being only a minor part, whereas comparative public law contributes solely to an explanation of the working of the society. The results gained at by public comparative law are more modest in exploring society than those of political sciences[167]. In focusing on legal aspects only, however, it approaches problems more precisely.

The method used in this research will be partly a functionalist one because a comparison will be made of how the Community Regulations were applied by the Member States in order to achieve the Community objectives enshrined in the EEC Regulations. Community objectives in the sense of the "functionalist" method are the "same needs" or the common denominator of the Member States. Taking the joint decision making process into account, however, it is apparent that the Community needs will not all necessarily comply with the Member States needs. Nevertheless, the reference to Community objectives is made for technical reasons in order to have a guideline.

To discover whether the Community needs expressed and objectives pursued were also the objectives and needs of the single Member States the necessary national socio-economic and political context will be revealed to a certain extent (see national reports). However, as outlined before, the emphasis is put on the legal differences in the Member States.

165 Bernhardt, R., (1964) 24 ZaÖRV, p. 432, 441; Kaiser, J. H. (1964) 24 ZaÖRV, p. 396, 401 et seq

166 Kaiser, J. H., (1964) 24 ZaÖRV, p. 401; Bernhardt, R., (1964) 24 ZaÖRV, p. 438, 441, 451

167 Bernhardt, R., (1964) 24 ZaÖRV, p. 435

Chapter II

Explanation of the Milk quota Regulations

In order to explain the milk quota Regulations and to highlight the four objectives that are scrutinized in the research, the general features of the system will be explained first (A) connected with a short survey of the structural measures linked to the milk quota Regulations (B). In more detail, the rules on the allocation of reference quantities (C), on their transfer (D), on the consideration of the economic situation of the tenant (E) and on the calculation and amount of the super-levy (F) will be examined.

A. General features of the milk quota Regulations

I. Basic Regulations

The three basic Regulations are Council Regulation 856/84 amending Council Regulation 804/68[168], Council Regulation 857/84[169] and Commission Regulation 1371/84[170]. The latter two adopt general rules of the application of the levy. Commission Regulation 1371/84 was revoked by Commission Regulation 1546/88[171]. All Regulations have been amended several times since their enactment[172], due to either economic

168 O. J. 1984, L 90/10; amended by inserting a new Art. 5 (c) in Council Regulation 804/68, O. J. 1968, L 148/13; for convenience, the Council Regulations 804/68 and 857/84 are designated as "Regulation 804/68 and Regulation 857/84"

169 O. J. 1984, L 90/13; based on Art. 5 (c) (6) of Regulation 804/68; this version is referred to if not indicated other

170 O. J. 1984, L 132/11; based on Art. 5 (c) (7) of Regulation 804/68

171 O. J. 1988, L 139/12

172 as to July 1992: latest amendment of Council Regulation 804/68: Council Regulation 2071/92, O. J. 1992, L 215/64; latest amendment of Council Regulation 857/84: 817/92, O. J. 1992, L 86/85; latest amendment of Commission Regulation 1546/88: Commission Regulation 1921/92, O. J. 1992, L 195/8

and social necessities, judgements of the ECJ or administrative difficulties[173].

II. Imposition of the levy on deliveries to dairies and direct sales

The milk quota system principally works by imposing an additional levy (also called super-levy[174]) on every litre of milk and milk products marketed in the European Community, that, during a twelve-month period, exceeds a so-called reference quantity[175]. Milk and milk products are mainly marketed by deliveries of milk to purchasers (mostly dairies) by the producer[176]. (so-called deliveries to dairies)[177]. The second, minor way of marketing is the direct sale[178] of milk and milk products by the producer to the consumer without going through an undertaking treating or processing the milk.

The levy is imposed on every litre notwithstanding the marketing method[179]. As far as the deliveries to dairies are concerned, however, for the purpose of implementing the levy, each Member State had the choice between two Formulas in order to determine the debtor[180]. Under Formula A, the levy is payable by every milk producer[181] on the quantities of milk and/or milk products which he has delivered to a purchaser and which for the twelve months concerned exceed a reference quantity to be determined. A producer is a natural or legal person or group of

173 Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 5; ONILAIT, Quotas laitiers, un bilan, p. 4; for the February 1985 and December 1986 changes see Schumann, W., EG-Forschung und Policy-Analyse, p. 128, p. 153

174 the expression "additional levy" was employed in the Regulations in order to distinguish the levy from the co-reponsibility levy; see Sorasio, D., (1988) Revue du marché commun, No 313, p. 11; to this purpose, the levy was also called "super-levy" see Cardwell, M., (1992) 29 C.M.L. Rev., p. 727

175 Sorasio, D., (1985) Revue du marché commun, No 291, p. 535; Usher, J. A., Legal Aspects of Agriculture in the European Community, p. 37, p. 74; Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 5

176 In 1984, 92,6 % of the milk produced in the European Community from dairy herds was delivered to dairies, Commission of the European Communities, The Agricultural Situation in the Community, 1985 Report, p. 382

177 for definition of delivery see Art. 12 (g) of Regulation 857/84

178 for definition of direct sale see Art. 12 (h) of Regulation 857/84

179 for deliveries to dairies see Art. 5 (c) (1) of Regulation 804/68 and for direct sales see Art. 5 (c) (2) of Regulation 804/68

180 Art. 5 (c) (1) of Regulation 804/68

181 for definition of producer see Art. 12 (c) of Regulation 857/84

natural and legal persons farming a holding and selling milk or milk products directly to the consumer and/or supplying the purchaser[182].

Under Formula B, the levy is payable by every purchaser of milk or other milk products on the quantities of milk or milk equivalent which have been delivered to him by a producer and which, during the twelve months concerned, exceed a reference quantity to be determined. A purchaser is an undertaking or grouping which purchases milk or milk products either to treat or process them or to sell them to one or more undertakings treating or processing milk or other milk products[183].

As far as direct sales are concerned, the levy is payable by every milk producer on the quantities of milk and/or milk equivalent he has sold for direct consumption and which, during the 12 months concerned, exceed a reference quantity to be determined[184].

III. Reference quantity and reference year

The amount up to which milk may be delivered or sold within a twelve-month period without the risk of paying any levies is called the reference quantity[185]. Reference quantities are fixed according to the amounts of milk delivered or sold by a producer from a holding or purchased by a purchaser in a certain calendar year before the introduction of milk quotas. This calendar year is called the reference year. The twelve-month period, by contrast, is the period lasting from the first of

182 Art. 12 (c) of Regulation 857/84

183 Art. 12 (e) of Regulation 857/84

184 Art. 5 (c) (2) of Regulation 804/68

185 Instead of "reference quantity", the term "quota" is employed synonymously though not referred to in the Regulations in question. "Quotas" as a means of state intervention exist in other economic sectors as well. However, quotas on sectors like the coal and steel market (Art. 58 of the ECSC Treaty) or the fishery sector, mean an absolute restriction of the production; see Sorasio, D., (1985) Revue du marché commun, No 291, p. 533. Legally, by the super-levy system on the dairy sector, no absolute restriction of production is given, see Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 5. Though the term reference quantity may be more precise, it is suggested that both be employed synonymously for convenience; economists allege that though legally no restriction of the production takes place, the economic effect of the levy means a prohibition of the production of the exceeding amount, see Boussard, J. M., (1985) 12 European Review of Agricultural Economics, p. 332

April of one year to the 31st of March of the next year (so-called milk year[186]).

B. Restructuring measures related to the milk quota system

The milk quota Regulations are above all an instrument of the market policy. However, several provisions are related to the structural policy of the CAP. Structural policy aims at improving the conditions of production, marketing and sales in the long run and is usually distinguished from market and price policy[187].

The milk quota Regulations and related measures intend to restructure the dairy sector[188]. Restructuring means promoting of farms that are capable of development[189], but also encouraging producers to cease production of a certain commodity. Cessation schemes as instruments of structural policy have been operated in the Community since the 1970s[190]. In the dairy sector, since 1984, several national[191] and Community schemes have been introduced to encourage producers to give up milk production. Up to now, three types of Community schemes have been established[192]. Apart from the immediate goal of the out-goer schemes, to reduce the number of inefficient milk producers, the released reference quantities can be used to allocate them to other producers[193]. Producers' reference quantities can thus be increased without augmenting the national guaranteed quantity. Re-allocating reference quantities is consequently the instrument for restructuring the dairy sector.

186 Art. 2 of Regulation 804/68, O. J. 1986, L 148/13

187 Art. 39 of the EEC Treaty; Gilsdorf, P., Strukturpolitik in der EG, in: Handwörterbuch des Agrarrechts, vol. 2, column 826

188 see Art. 5 (c) of Regulation 804/68, as amended by Council Regulation 856/84, O. J. 1984, L 90/10

189 Art. 39 (1) (a) of the EEC Treaty

190 Directive 72/160, O. J. 1962, L 96/2 ; Council Regulation 1096/88, O. J. 1988, L 110/1

191 based on Art. 4 (a) of Regulation 857/84, amended several times in order to make it more flexible, see Council Regulation 1343/86, O. J. 1986, L 119/34 and Council Regulation 3880/89, O. J. 1989, L 378/3

192 Council Regulation 1336/86, O. J. L 119/21; Council Regulation 1899/87, O. J. 1987, L 182/39; Council Regulation 1183/90, O. J. 1990, L 119/27

193 Art. 4 (2), 5 of Regulation 857/84

C. Determination and allocation of reference quantities

The levy is only due if a certain threshold, i.e. reference quantity of milk, is exceeded. The determination and allocation of these quantities works as follows[194]: Firstly, a so-called guaranteed total quantity for the Community as a whole consisting of both guaranteed total quantities for deliveries to dairies and direct sales is fixed. Secondly, these quantities are distributed among the Member States (so-called national guaranteed quantities). Thirdly, the Member States divide this sum up between producers or purchasers.

I. Guaranteed total quantity and national guaranteed quantities concerning deliveries to dairies[195]-Community reserve

In 1984, the guaranteed total quantity for the Community for deliveries to dairies for the first five-year period of the application of the milk quota system was fixed at a sum corresponding to the amount of quantities of milk delivered in each Member State during the 1981 calendar year, plus 1 %[196]. Since 1984, the amount of the guaranteed total quantity has been both increased[197] and reduced by several measures. The reduction took place in two ways[198]: Firstly, since 1986/87, the amount has been cut several times[199] with the consequence of a corresponding reduction of individual reference quantities[200]. No such reduction took place if

194 see Preamble of Council Regulation 856/84, O. J. 1984, L 90/10 and Art. 5 (c) (3) of Regulation 804/68, as amended by Council Regulation 856/84, O. J. 1984, L 90/10

195 direct sales, to which the same principles apply, are not treated, however, are referred to where necessary

196 Art. 5 (c) (3) of Regulation 804/68, the sum was increased for the first twelve-month period in order to allow transition to the new system, see Preamble of Council Regulation 856/84 ; for direct sales, see Art. 6 of Regulation 857/84

197 rendered necessary by the accession of Spain and Portugal and the unification of Germany

198 The guaranteed total quantity for direct sales was also cut, however, no suspension took place, see Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 6

199 first cut by Council Regulation 1335/86, O. J. 1986, L 119/19; for survey see Deutscher Raiffeisenverband (ed.), Die Milchquotenregelung, p. 16 et seq

200 see Art. 2 (3) of Regulation 857/84 as amended by Council Regulation 1911/86, O. J. 1986, L 165/6

the proportion that had to be reduced could be released by producers who were willing to take part in Community out-goer schemes[201].

Secondly, since 1987/88, a uniform proportion of each individual reference quantity has been temporarily withdrawn[202] with the consequence that the levy shall be due on the amount of milk or milk equivalent, delivered or purchased during each of the twelve-month periods in question, that is, in excess of the amount of reference quantities not withdrawn. However, producers are granted a compensation for the quantities withdrawn[203].

The reason for the first cuts and withdrawals in 1986/87 were the increasing stocks and expenditures of the EAGGF from 1985 onwards[204] because in 1985/86 and 1986/87 the quantities produced in Member States exceeded the guaranteed total quantity[205].

The guaranteed total quantity for the Community is distributed among the Member States on the basis of deliveries on their territory during the 1981 calendar year plus 1 %[206].

A so-called Community reserve is constituted in order to supplement, at the beginning of each twelve-month period, the guaranteed quantities of the Member States in which implementation of the levy system raises particular difficulties liable to affect their supply or production structures[207]. Since the beginning, the amount has been increased significantly

201 first scheme: Council Regulation 1336/86, O. J. 1986, L 119/21; second scheme: Council Regulation 1637/91, O. J. 1991, L 150/31. Because in most Member States there were not enough participants in the first programme, Member States were authorized to compensate producers whose reference quantities had to be reduced, Art. 5 (5) of Council Regulation 776/87, O. J. 1987, L 78/9; Sorasio, D., (1988) Revue du marché commun, No 313, p. 17; Bundesregierung (ed.) Agrarbericht 1988, p. 76

202 first withdrawal see Council Regulation 775/87, O. J. 1987, L 78/5; for survey see Deutscher Raiffeisenverband (ed.), Die Milchquotenregelung, p. 16 et seq

203 Art. 2 of Council Regulation 775/87, O. J. 1987, L 78/5

204 Commission of the European Communities, The Agricultural Situation in the Community, 1987 Report, p. 38, T/298; COM (86) 645 final, p. 1

205 Commission of the European Communities, The Agricultural Situation in the Community, 1987 Report, T/297

206 enlisted in Art. 5 (c) (3) of Regulation 8O4/68, as amended by Council Regulation 856/84, O. J. 1984, L 90/10; for structural reasons, Italy, Ireland and Spain were allowed to use 1983 as reference year, Council Regulation 856/84, O. J. 1984, L 90/10; for Spain see Council Regulation 1335/86, O. J. 1986, L 119/19

207 Art. 5 (c) (4) of Regulation 804/68, as amended by Council Regulation 856/84, O. J. 1984, L 90/10; for both direct sales and deliveries to dairies see The Federation of UK MMBs, UK Dairy Facts & Figures, 1991 edition, p. 57; Luxembourg,

and its use has been extended to certain categories of producers[208]. In particular, so-called "SLOM-producers"[209] and producers with "special needs" (so-called "Nallet quota") were considered[210].

II. Determination of reference quantities for deliveries to dairies within each Member State[211]

1. Choice between two Formulas by the Member State

The levy system shall be implemented in each region of the territory of the Member States in accordance with one of the two Formulas[212]. The choice of the Formula also determines who is allocated reference quantities[213]. Under Formula A, thus, the producer who is the debtor of the levy is allocated reference quantities[214], whereas under Formula B, the reference quantities are allocated to purchasers who distribute them among producers[215].

2. Objective when granting the possibility of a choice between two Formulas

The possibility of a choice between two Formulas was provided for in order to take into account the diversity of milk production structures and of milk-collecting in the different regions of the Community, the administrative problems arising and the regional development policy[216].

Northern Ireland and Ireland were considered initially, see Art. 1 of Commission Regulation 1371/84, O. J. 1984, L 132/11

208 Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 8; see Council Regulation 818/92, O. J. 1992, L 86/87

209 see under II. 4 a)

210 The Community reserve was increased in 1989 by 1 % at the expense of the guaranteed total quantity (so-called Nallet [=French Agricultural Minister] quota); Council Regulation 3879/89, O. J. 1989, L 378/1

211 direct sales are not treated. Except for the choice of the Formulas, the same principles apply for them; see Blumann, C.; Lusson-Lerousseau, N., JurisClasseur rural, vol. 3, Fasc. D-1, p. 6

212 Art. 5 (c) (1) of Regulation 857/84

213 Art. 2 of Regulation 857/84

214 Art. 2 (1) of Regulation 857/84

215 Art. 2 (1) of Regulation 857/84

216 see Preamble of Council Regulation 856/84, O. J. 1984, L 90/10; as for milk-collecting see Art. 5 (c) (1) of Regulation 804/68, as amended by Council Regulation 856/84, O. J. 1984, L 90/10; objectives confirmed by Case C-267/88 - C-285/88, Wuidart et al v Laiterie coopérative eupenoise et al [1990] E.C.R., p. I-435 (I-481)

The implementation of either Formula in a region, whether in part or all of the territory of the Member State, shall, consequently, comply with one or more of the following three criteria. The first criterion is the administrative viability, the second the need to facilitate structural change and adaption and the third are regional development requirements, one consideration being the need to avoid the desertification of certain areas[217]. The Formulas thus should enable the Member States to implement the levy in a way that is most suitable for their production, administrative and regional structures.

If a producer under Formula B remains in one twelve-month period below his reference quantities, the purchaser to whom he delivers may, at the end of the milk year, equalize these unused quantities with the quantities of other producers, who delivered milk and milk products in excess of their reference quantities[218]. This method of equalization under Formula B is not expressly mentioned in the Regulations. However, the Preamble of Regulation 857/84 recognizes this possibility and the fact that the purchaser is the debtor implicitly allows the equalization. This was confirmed by an ECJ judgement[219].

Unused quantities would occur in particular in regions with inefficient milk production structures[220]. The equalization thus might help facilitate structural adjustments and avoid the desertification of areas because the effect of the levy on exceeding producers is mitigated[221]. Fewer milk producers might be forced to give up milk production. Structural adjustment was important in some Member States where the dairy sector was in the process of restructuring, namely in France[222].7 Thus, diverse milk production structures within the Community are taken into account. By the distribution of unused reference quantities within a region a regional development policy can be conducted[223]. As far as the administrative viability is concerned, the administration and control under Formula B

217 Art. 1 (2) of Regulation 857/84

218 Harvey, D. R., Milk quotas, p. 21

219 Case 61/87, Thevenot et al v Centrale laitière de Franche-Comté [1988] E.C.R., p. 2375 (2391 et seq)

220 Wehland, W., (1988) top agrar, No 4, p. 118

221 Gadbin, D., (1985) Revue de droit rural, No 138, p. 509; see also Art. 5 (c) (1) of Regulation 804/68, as amended by Council Regulation 856/84, O. J. 1984, L 90/10

222 for details see fourth chapter

223 regional development policy is not considered in this research

seems less complicated because under Formula B, there are fewer debtors than under Formula A[224].

Originally, only Formula B was envisaged by the Commission proposals[225]. Implementing a system based on the producers' levy liability (Formula A) in a Member State would, however, result in a more personal and financial responsibility of the producers for exceeding quantities[226]. In addition, any reduction of surplus would be much easier to attain, because there is no possibility of equalization under Formula A[227]. Because the producers' levy liability does not depend on the situation of over- and underdeliveries of their purchasers, it can moreover be ensured that the producers of different purchasers are equally treated[228]. Unequal treatment would in particular occur between producers in Member States with diverse milk production and milk-collection structures within their borders: In inefficient regions, there would be a high amount of unused quotas advantaging producers with overdeliveries[229]. The larger the collection zone is and thus the greater the amount of milk collected, the higher the probability of the same amount of under- and overdeliveries[230]. These last aspects were the reason the introduction of a second Formula was suggested during the negotiations[231]. As far as the administrative viability is concerned, under Formula A, purchasers are not charged with a levy and might probably be less involved in the administration of the levy-system. In addition, under Formula B, reference quantities are allocated on two levels - to the purchasers and producers; whereas under Formula A, only producers receive reference quantities.

224 Burrel, A., (1988) Cahiers d'économie et sociologie rurales, No. 7, p. 79

225 COM (83) 500 final, p. 23; Sorasio, D., (1985) Revue du marché commun, No 291, p. 538

226 Harvey, D. R., Milk quotas, p. 21

227 Oskam, A. J. et al, The superlevy - Is there an alternative?, p. 36

228 Oskam, A. J. et al, The superlevy - Is there an alternative?, p. 36; Dillen, M.; Tollens, E., Milk quotas, vol. 1, p. 17

229 Wehland, W., (1988) top agrar, No. 4, p. 118

230 Harvey, D. R., Milk quotas, p. 28

231 Sorasio, D., (1985) Revue du marché commun, No 291, p. 538; see COM (83) 548 final; Petit, M. et al, Agricultural policy formation in the European Community, p. 125 et seq

The possibility of introducing Formula A was strongly favoured by the Germans[232]. Member States may change the Formula during the application of the superlevy system[233].

3. Definition of a region

The Formulas are implemented in each region of the territory of the Member States[234]. The definition of the regions is fixed in Art. 2 (1) of Regulation 857/84. A region may be part of the territory of a Member State which has geographical unity and in which the natural conditions, the structures of production and the average yields of the herds are comparable. Alternatively, all of the territory of the Member State may constitute a region[235]. Whether in this case the whole territory must have geographical unity and comparable structures was not made clear. The ECJ who was referred to for a preliminary ruling held that the Member States must, when choosing whether the whole territory constitutes a region or whether their territory consists of several regions, take into account the geographical unity and economic conditions. But a Member State may regard its whole territory as a region even if the territory is not a geographical unit in which the natural conditions, structures of production and average herd yields are comparable unless such a decision is manifestly unsuited to the structures of the Member State in question[236]. Member States thus enjoy considerable discretion in determining whether the whole territory can be regarded as a region.

4. Determination of the reference quantities of each producer or purchaser

a) Basic rule and producers in special situations

The reference quantities of producers or purchasers are equal to the quantities of milk or milk equivalent delivered by the producer during

232 Agra-Europe 43/83, Europa-Nachrichten, p. 22

233 see Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 7; In the first twelve-month period, the UK e.g. chose Formula B for its whole territory except for Northern Ireland, where Formula A was implemented, Oskam, A. J. et al, The superlevy - Is there an alternative?, p. 28

234 Art. 5 (c) (1) of Regulation 804/68, as amended by Council Regulation 856/84, O. J. 1984, L 90/10

235 Art. 1 (2) subparagraph (1) of Regulation 857/84

236 Case C-267/88 - C-285/88 Wuidart et al v Laiterie coopérative eupenoise et al [1990] E.C.R., p. I-435 (I-486)

the 1981 calendar year (Formula A) or to the quantity of milk or milk equivalent purchased by a purchaser during the 1981 calendar year (Formula B), plus 1 %[237]. If a producer under Formula B changes his purchaser, the reference quantity of the latter will be increased[238].

This basic rule of calculating the individual reference quantity only applies if the Member State does not avail itself of the possible choice of either 1982 or 1983 as the national reference year[239].

Producers[240] in so-called special situations are subject to a different method of calculating reference quantities. They are allocated specific or additional reference quantities. These producers are, according to Art. 3 - 4 of Regulation 857/84, producers who invested into dairy facilities by e.g. having adopted milk production development plans under Directive 72/159[241] lodged before 1 March 1984 and the so-called "SLOM-producers" (Slacht en Omschakelingspremie)[242]. Moreover, young farmers setting up after 31 December 1980[243], milk producers whose milk production has been affected by exceptional events occurring during or before the reference year chosen by a Member State[244], so-called small producers[245], producers in disfavoured or mountain areas[246] and newly in-

237 Art. 2 (1) of Regulation 857/84; no express rules are provided for the calculation of the producers' reference quantities under Formula B, see Gadbin, D., (1985) Revue de droit rural, No 138, p. 513

238 Art. 8 of Regulation 857/84; Sorasio, D., (1985) Revue du marché commun, No 291, p. 544

239 Art. 2 (2) of Regulation 857/84

240 both under Formula A and B

241 O. J. 1972, L 96/1 on the modernization of farms

242 Art. 3 (a) of Regulation 857/84 as amended by Council Regulation 764/89, O. J. 1989, L 84/2; amended again by Council Regulation 1639/91, O. J. 1991, L 150/35; The SLOM-producers had taken part in the Conversion and Non-marketing of Milk Premium Scheme introduced in 1977 (Council Regulation 1078/77, O. J. 1977, L 131/1) and operated by the Community in the period from 1977-1981. Because participating producers were obliged to withhold from milk production for five years, some of them did not qualify for a reference quantity. Under a preliminary ruling, the ECJ held the Regulations to be void because they infringed the principle of legitimate expectation. (Case 120/86 Mulder v Minister van Landbouw en Visserij [1988] E.C.R., p. 2321 (2353) and Case 170/88 von Deetzen v HZA Hamburg-Jonas [1988] E.C.R., p. 2355 (2372))

243 Art. 3 (2) of Regulation 857/84

244 Art. 3 (3) of Regulation 857/84

245 Council Regulation 3880/89, O. J. 1989, L 378/3, amending Regulation 857/84; Art. 3 (c) of Regulation 857/84, as amended by Council Regulation 1183/90, O. J. 1990, L 119/27

246 as defined by Directive 75/286, O. J. 1975, L 128/1, amended by Council Regulation 797/85, O. J. 1985, L 93/1

stalled farmers[247] are considered. Finally, producers realizing a milk production development plan approved after the entry into force of Regulation 857/84 under Directive 72/159 and milk producers undertaking farming as their main occupation[248] are taken into account. Of all provisions concerning "special situations", only Art. 3 No 3 of Regulation 857/84 is a mandatory provision[249].

b) Sources for the allocation of reference quantities for producers in special situations: national reserve

The quantities which are allocated to producers in "special situations" shall be drawn from a so-called "national reserve" which is constituted by the Member States[250]. The quantities supplying the national reserve must not exceed the national guaranteed quantity[251]. The sums of the national reserve may derive from three main sources: First of all, Member States were entitled to withhold a certain percentage within the limits of their guaranteed quantity[252]. Secondly, reference quantities may be subtracted from the transferor in case of a transfer of a holding or parts thereof and may be added to the national reserve. Thirdly, the major source are reference quantities released by a producer giving up milk production under an out-goer scheme[253].

To sum up, the main rule governing the allocation of reference quantities is that the Member States are obliged to guarantee that the national quantity will not be exceeded when reference quantities, in particular specific and additional reference quantities, are allocated[254]. The rule is deduced from Art. 5 (c) (3) of Regulation 804/68[255] and Art. 5, 6 of Regulation 857/84.

247 Art. 3 (c) of Regulation 857/84, as amended by Council Regulation 3880/89, O. J. 1989, L 378/3 establishing the so-called "Nallet" quota, see under C. I.

248 Art. 4 (1) (b) (c) of Regulation 857/84

249 Sorasio, D., (1985) Revue du marché commun, No 291, p. 540

250 Quantities for some groups of the producers in special situations such as the "SLOM-producers" are drawn from the Community reserve, see under C. I.

251 Art. 5 of Regulation 857/84

252 Commission of the European Communities, Milk, The Quota System, (1984) 203 Green Europe, p. 11; see Art. 2 (3) and 5 of Regulation 857/84

253 Art. 4 (2) of Regulation 857/84; Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 7

254 Sorasio, D., (1985) Revue du marché commun, No 291, p. 535, 541; Case 120/86 Mulder v Minister van Landbouw [1988] E.C.R., p. 2321 (2350)

255 as amended by Council Regulation 856/84, O. J. 1984, L 90/10

D. Transfer of reference quantities

Art. 7 of Regulation 857/84 and Art. 5 of Commission Regulation 1371/84[256] provide for the rules of transfer of reference quantities. These rules are governed by the principle of attachment of quotas to the holding.

I. Principle of attachment of quotas to a holding

1. Meaning of the principle

According to Art. 7 (1) of Regulation 857/84, all or part of the corresponding reference quantity is transferred to the buyer, tenant or heir, if an undertaking is sold, leased or transferred by inheritance[257]. From the wording of this article, the principle of the attachment of the reference quantities to a holding is deduced[258]. It purports that the reference quantities that are allocated to the producer are attached to the exploited holding or parts therof[259]. The consequence of the principle is, on the one hand, that reference quantities are transferred in case of the transfer of the correspondent holding or parts of it. On the other hand, reference quantities are not transferable unless a holding or parts of it are sold, leased or transferred by inheritance[260].

In practice, the principle of attachment of reference quantities to a holding implies that apart from getting allocated quotas from the Member States, producers can only receive or increase quotas by acquiring or leasing a holding or parts of it at the same time[261].

256 O. J. 1984, L 132/11

257 see Art. 6 (5) of Regulation 857/84 for direct sales

258 Nies, V. in: Lukanow, J.; Nies, V., Die Milchgarantiemengen-Regelung, 3rd edition, p. 16; Gadbin, D.; Charles-Le-Bihan, D., (1985) Revue de droit rural, No 131, p. 72

259 Mégret, J. (199O) Purpan, No 155, p. 113

260 Dictionnaire Permanent Entreprise Agricole, Table analytique, Quotas laitiers (régime juridique), p. 786; Hähnel, W. in: Lukanow, J.; Nies, V.; Hähnel, W., Die Milchgarantiemengen-Regelung, 2nd edition, p. 37

261 Crossley, G., (1985) 24 Farmland Market, p. 16; Dillen, M.; Tollens, E., Milk quotas, vol. 1, p. 27

2. Reasons for attaching reference quantities to the holding

The legislator introduced a restrictive Regulation by attaching reference quantities to a holding in order to prevent disproportionately high amounts of reference quantities from being concentrated on few parcels[262]. Intensive farming would probably have been promoted if reference quantities were not attached to the holding. In addition, the draftsmen intended to avoid the emergence of a market where detached quotas would be tradeable assets and be subject to speculations[263]. A market would occur if quotas were detached from land. On such a market, the financially strong producers would get the bid and purchase reference quantities out of underdeveloped regions, above all out of those with a large proportion of grassland[264]. Attaching reference quantities to land thus supports farming in less favoured areas. It reflects, moreover, the general EEC policy of trying to preserve the family type farm[265]. The most distinct feature of a family farm is, despite a common definition[266], that the production is linked to a certain amount of land[267]. The danger of attaching reference quantities to a holding, however, is that of freezing the existing milk production structures and of preventing the development of an adequate milk production structure[268].

In order to avoid the emergence of quota markets, a set of transfer rules have been elaborated. When explaining them, firstly the conditions for the transfer of reference quantities and secondly, the legal consequences once the conditions are fulfilled, will be looked at.

262 Lorvellec, L., (1985) Revue de droit rural, No 136, p. 527, 532; Wienberg, D.; Höller, T., (1986) Berichte über Landwirtschaft, p. 206

263 Blumann, C.; Lusson-Lerousseau, N., Juris-Classseur rural, vol. 3, Fasc. D-1, p. 9; Lorvellec, L., (1985) Revue de droit rural, No 136, p. 527; Boon-Falleur, (1990) Revue de droit rural, No 184, p. 299; Gadbin, D.; Charles-Le-Bihan, D., (1985) Revue de droit rural, No 131, p. 72

264 Nies, V. in: Lukanow, J.; Nies, V., Die Milchgarantiemengen-Regelung, 3rd edition, p. 15; Sorasio, D., (1985) Revue du marché commun, No 291, p. 543; Wienberg, D.; Höller, T., (1986) Berichte über Landwirtschaft, p. 206

265 Rohr, H.-J., (1984) Agrarrecht, p. 296; Gomoll, E., (1985) Recht der Landwirtschaft, p. 32; Zeddies, J.; Heim, L., (1988) Cahiers d'économie et sociologie rurales, No 7, p. 102

266 see Snyder, F. G., Law of the Common Agricultural Policy, p. 157 et seq

267 Gomoll, E., (1985) Recht der Landwirtschaft, p. 32

268 Sorasio, D., (1985) Revue du marché commun, No 291, p. 535; Oskam, A. J. et al, The superlevy - Is there an alternative?, p. 7

II. Conditions for the transfer of reference quantities

1. Transactions of the holding or parts of it that entail the transfer of reference quantities

Art. 7 of Regulation 857/84 enlists the sale, lease and inheritance of a holding[269] or of parts of a holding as examples for transactions that entail the transfer of reference quantities. According to Art. 5 (3) of Commission Regulation 1371/84[270], transfers that have comparable legal effects to those brought about by the transfer of the holding upon a sale, lease and inheritance entail likewise a transfer of reference quantities.

The EEC Regulations do not define what the comparable legal effects to those brought about by the transfer of a holding by lease, sale or inheritance are. However, the ECJ ruled that the surrender of a tenanted holding upon the expiry of a lease has comparable legal effects to those brought about by the transfer of the holding upon the grant of the lease, for both transactions entail a change in the possession of the production units in question within the contractual relations created by the lease[271]. Deducing from the ECJ decision, any change in the property of the production units in question has comparable legal effects to those brought about by the transfer of the holding upon the sale and inheritance.

To sum up, any change of the right of possession (resp occupancy) or property (resp ownership) subsequently entails the transfer of reference quantities. But exactly which legal transactions have comparable effect depends on the legal orders of the Member States and their concept of possession and property.

2. no transaction concerning the holding or parts therof required in the case of leasing

Since 1986/87 Member States have been authorized to introduce the possibility of the temporary re-allocation of unused reference quantities between producers of one purchaser for one twelve-month period without any transaction of the holding[272] (so-called leasing). The facultative pro-

269 A holding comprises, according to Art. 12 (d) of Regulation 857/84, all the production units operated by the producer and located within the geographical territory of the Community

270 now Art. 7 of Commission Regulation 1546/88, O. J. 1988, L 139/12

271 Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] E.C.R., p. 2609 (2638)

272 Council Regulation 2998/87 amending Regulation 804/68, O. J. 1987, L 285/1

vision was passed in order to take into account producers' unused reference quantities during a twelve-month period[273]. Structural adjustments could be facilitated[274]. Another reason was to recognize the temporary re-allocation of reference quantities that was already practiced in some Member States, namely in the UK[275]. The possibility of leasing enables producers to produce milk in excess of their reference quantities. At the same time the principle of attachment of reference quantities to a holding is breached.

III. Legal effects of lease, sale and inheritance and other transfers with similar effect

If a lease, sale and inheritance and other transfers with similar effect took place, the reference quantities being attached to this holding or parts of the holding are automatically transferred to the transferee (1). Departing from the principle of attachment of reference quantities to the holding, the whole amount or parts of the reference quantities may be transferred to the national reserve (2) or be retained by the transferor (3).

1. General legal effect: transfer of reference quantities to the transferee

If an entire holding is sold, leased or transferred by inheritance, all of the corresponding reference quantity shall be transferred to the purchaser, tenant or heir[276].

If parts of a holding are transferred, the corresponding reference quantity shall be transferred[277]. The corresponding reference quantity has to be fixed according to the areas used for milk production or according to other criteria[278]. Other criteria might be cattle or other parts of the dead and live stock[279]. These rules fix the principle of proportionality, which means that reference quantities have to be apportioned in the

273 Council Regulation 2998/87, O. J. 1987, L 285/1

274 Sorasio, D., (1988) Revue du marché commun, No 313, p. 14

275 see The MMB of England and Wales, Five Years of Milk Quotas, p. 8, p. 27

276 Art. 7 of Regulation 857/84

277 Art. 7 of Regulation 857/84

278 Art. 5 (2) of Commission Regulation 1371/84, O. J. 1984, L 132/11 now Art. 7 (1) of Commission Regulation 1546/88, O. J. 1988, L 139/12

279 Lorvellec, L., (1987) Revue de droit rural, No 157, p. 410; Lorvellec, L., (1985) Revue de droit rural, No 136, p. 532

case that parts of the holding are transferred[280]. However, the wording of the provision, which intends to avoid the speculation with reference quantities, leaves a wide discretion to the Member States in fixing the criteria for the apportionment of the reference quantities[281]. In particular, it is not clear whether the apportionment has to be made in a strictly proportionate way nor who controls it.

2. Transfer of reference quantities to the national reserve

Entirely facultative provisions envisage the addition of reference quantities to the national reserve. Reference quantities may be released to the national reserve in case of any transfer of these quantities[282] or if only parts of a holding are transferred whose size is below a certain number of ha fixed by the Member State[283]. The latter rules try to avoid the speculation with reference quantities, in particular the transfer of a disproportionately large amount of quotas with a small piece of land only[284]. Finally, if a holding or parts of it are transferred and the land is not used for milk production[285] and if land is transferred to authorities and/or is supposed to be used in the public interest[286], the corresponding reference quantities may be transferred to the national reserve. In both these latter cases, the transferee does not need reference quantities[287]. The rules on the release of quotas to the national reserve thus serve mainly to avoid quota markets but they also serve to increase the refer-

280 Gomoll, E., (1985) Recht der Landwirtschaft, p. 32

281 Gadbin, D., (1985) Revue de droit rural, No 138, p. 513; Lorvellec, L., (1987) Revue de droit rural, No 157, p. 410

282 Art. 7 (3) of Regulation 857/84 as amended by Council Regulation 590/85, O. J. 1985, L 68/1

283 Art. 5 (2) of Commission Regulation 1371/84, O. J. 1984, L 132/11 now Art. 7 (2) of Commission Regulation 1546/88, O. J. 1988, L 139/12, only in 1987, the Commission clarified that the amount that is not transferred may be released to the national reserve, Commission Regulation 1681/87, O. J. 1987, L 157/11

284 Lorvellec, L., (1987) Revue de droit rural, No 157, p. 416

285 Art. 5 subparagraph 4 of Commission Regulation 1371/84 as amended by Commission Regulation 1881/87, O. J. 1987, L 157/11, now Art. 7 subparagraph 4 of Commission Regulation 1546/88, O. J. 1988, L 139/12

286 Art. 7 (3) of Regulation 857/84 as amended by Council Regulation 590/85, O. J. 1985, L 68/1

287 the use for public interest, however, was also introduced to take into account expropriatory measures

ence quantities for producers in special situations who are allocated reference quantities from the national reserve[288].

3. Reference quantities are retained by the transferor

Member States may regulate that the reference quantities are retained by the transferor if land is transferred to administrative agencies and/or for public use[289]. As for the retention of quotas by the tenant see below.

E. Consideration of a difficult economic

I. Retention of reference quantities by the tenant

1. Principal rules

Acccording to the European rules, tenants who occupied the holding in 1984, are allocated reference quantities because they are producers. Tenants who return the leased land are subject to the general principles, i.e. they have to transfer the corresponding reference quantities back to the transferor because the surrender of a tenanted holding upon the expiry of a lease has legal effects comparable to those brought about by the transfer of the holding upon the grant of the lease. (see above)

In 1985, Art. 7 (4) of Regulation 857/84[290] introduced an exception to this rule. According to this entirely facultative provision[291], Member States may provide that, in the case of rural leases due to expire, where the lessee is not entitled to an extension of the lease on similar terms, all or part of the reference quantity corresponding to the holding or the part therof which forms the subject of the lease be put at the disposal of the departing lessee if he intends to continue milk production. Tenants are put in difficult economic and social situations if they have to restitute reference quantities because the amount of milk they can produce in the future is restricted[292]. This is especially serious in Member States where tenants

288 see Lorvellec, L., (1987) Revue de droit rural, No 157, p. 410

289 Art. 7 (1) of Regulation 857/84 as amended by Council Regulation 590/85, O. J. 1985, L 68/1

290 as amended by Council Regulation 590/85, O. J. 1985, L 68/1

291 Lorvellec, L., (1987) Revue de droit rural, No 157, p. 410

292 see Preamble of Council Regulation 590/85, O. J. 1985, L 68/1; Lorvellec, L., (1985) Revue de droit rural, No 136, p. 527

may only ask for the extension of their contract under exceptional circumstances. But even if the landlord agrees to an extension, tenants who are not protected by state controlled rents or by procedures of rent review would probably have to pay a much higher rent than before, because the value of the land has increased since the introduction of the quota system. Under such legal conditions, the tenants whose contracts expired either had the possibility of renewing the contract with a higher rent or of continuing without a certain amount of reference quantities[293]. This regulation was mainly elaborated because of German pressure[294].

2. Infringement of the tenant's fundamental rights - the "Wachauf" case

To sum up, the tenant quitting the holding only enjoys protection under exceptional circumstances. The application of this rule is purely at the discretion of the Member States. The question arises as to whether this Regulation is compatible with the fundamental rights of the tenants. The tenant may be deprived of the fruits of his labour and of his investments, in particular if he built up a dairy enterprise on a leased holding before the super-levy system was introduced. In such a context, by way of a preliminary ruling, however, the ECJ ruled that the Community legislation was adequate. According to the ruling, the Community Regulations leave the competent national authorities a sufficiently wide margin of appreciation to enable them to apply the Community rules in a manner consistent with the requirements of the protection of fundamental rights, either by giving the lessee the opportunity of keeping all or part of the reference quantity if he intends to continue milk production, or by compensating him if he undertakes to definitively abandon such production[295]. The latter possibility refers to the participation of tenants in out-goer schemes. However, the Regulations do not specify whether the landlord's consent is required[296].

293 Gadbin, D., (1985) Revue de droit rural, No 138, p. 513; Sorasio, D., (1985) Revue du marché commun, No 291, p. 544

294 see G.A. Jacobs in Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] E.C.R., p. 2609 (2631); Lukanow, J., Nies, V. in: Lukanow, J.; Nies, V.; Hähnel, W., Die Milchgarantiemengen-Regelung, 2nd edition, p. 20; Rohr, H.-J., (1984) Agrarrecht, p. 296; Bernard, A., (1987) Revue de droit rural, No 150, p. 53

295 Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] E.C.R., p. 2609 (2640)

296 see Lorvellec, L., (1987) Revue de droit rural, No 157, p. 410

The ECJ does not define the precise fundamental rights of the tenants which might be infringed if he is deprived of the fruits of his labour but the court assumingly referred to the right to property[297].

The foremost objective of the Community, therefore, when providing for rules favourable to the tenants, was to consider the difficult economic and social situation of some groups of tenants that arise because of national agricultural tenancies laws. The ECJ has underlined that the application of the rules must comply with the fundamental rights of the tenants. But to discover exactly which rights the tenant enjoys with regard to the quota, the legal nature of the quota and the owership of the quota must be investigated.

II. Legal nature and ownership of the reference quantity

1. Reference quantity as an instrument of market management?

The Community Regulations do not specify the legal nature of the reference quantity[298] but provide ambiguous rules[299]. By attaching reference quantities to a holding or parts of it, the reference quantities are not yet legally qualified.

According to the Commission, the reference quantity was created as a mere instrument of market management[300]. This instrument is deemed to have no economic value and thus, no property rights can exist in relation to it.

The reference quantity, however, gained an economic value in practice, evidenced by increased rental and capital values for holdings with refer-

297 Cardwell, M., (1992) 29 C.M.L. Rev., p. 743

298 G. A. Jacobs in Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] E.C.R., p. 2609 (2630); see in detail Hélin, F., Les quotas laitiers. De l'autorisation administrative au droit des patrimoines, p. 139 et seq; as far as the legal nature of the reference quantity under French law is concerned see p. 176 et seq; under English law p. 227 et seq; access to the completed thesis has not yet been possible by the end of the academic year 1991/92

299 Pinfold, E., (1985) 82 LS Gaz, No 17, p. 1313; Bonneau, J. R., (1984) Gazette du Palais, (2e sem.) doctrine, p. 406; Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 10

300 Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] E.C.R., p. 2609 (2630); Lorvellec, L., Dorit rural, p. 488; Boon-Falleur, (1990) Revue de droit rural, No 184, p. 299

ence quantities[301]. Because the transfer rules were mitigated as leasing was allowed, the reference quantities that are leased out are tradeable and negotiable assets as is illustrated by the prices that are paid for these quantities[302]. Because of this economic reality, it is suggested that the reference quantity be considered as a property right[303]. Deplorably, the ECJ in the case "Wachauf" has not specified whether the quota is a property right.

2. Ownership of the quota

The European Regulations do not define the ownership of the quota, but provide ambiguous rules: On the one hand, reference quantities are attached to a holding and thus to the owner of the holding. On the other hand, they are allocated to producers thus also to tenants who are not necessarily owners[304]. This contradiction becomes apparent in the case of the restitution of leasehold land. However, in this case the reference quantities have to be retransferred to the landlord, although there is the possibility of exceptions. This proves that the reference quantities do not belong to producers but are attached to the holding and may be used by persons with a right to this holding. Other interpretations stating that the reference quantity belongs to the producers neglect the fact that the possibility of tenants retaining a certain amount of reference quantities is only an exception to the rule[305].

The explanation for the lack of clarity as far as the legal nature and the ownership of the reference quantity including the position of the tenant are concerned might be that the subject matter in question, the law of property and the agricultural tenancies laws, in the Community have been

301 see e.g. UK, the size of a dairy farm's quota became the biggest factor in its selling price and holdings with a poor quota have seen their land values drop by up to 40 per cent in comparison with 1983, see Crossley, G., (1985) 23 Farmland Market, p. 15

302 Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 9 et seq

303 "droit réel" and "object de propriété", Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 10; see Lorvellec, L., Droit rural, p. 488

304 according to Gadbin, D., (1985) Revue de droit rural, No 138, p. 513, under Formula B, reference quantities could be considered as being personal property of the purchasers

305 see Sorasio, D., (1985) Revue du marché commun, No 291, p. 543 et seq who states that the reference quantities are rights of the producers

up to now entirely governed by national law[306]. That is why the Community legislator leaves the final decision as to who is entitled to the reference quantities to the Member States[307], though the super-levy system has a significant impact on the relationship between landlord and tenant.

Apart from this legal reason, it is apparent that the Community legislator did not want to fix the ownership of the quota because in this case the legislator would have admitted that a property right can arise in a quota. Recognizing the quota as a property right meant encouraging the rise of quota markets[308].

F. Calculation and amount of the levy

I. Calculation of the levy-Equalization

For the purpose of levy calculation, under Formula B, equalization between over- and underdeliveries takes place (1.). In 1985, the possibility of equalization was also introduced under Formula A. (2.)

1. Equalization under Formula B

Under the original Regulations, the purchaser who was liable to pay a levy passed on the burden in the price paid to those producers who have increased their deliveries, in proportion to their contribution to the purchaser's reference quantity being exceeded[309]. In practice, the actual levy paid by the producer is less than 100 % of the target price, because the full amount of the levy paid by the purchaser is spread over the total amount of exceeding reference quantities[310].

Because the deterring effect of the levy was not sufficient and the financial reponsibility of the producer was mitigated, the Formula B rules

306 Cardwell, M., (1992) 29 C.M.L. Rev., p. 744

307 Cardwell, M., (1992) 29 C.M.L. Rev., p. 743

308 see also G.A. Jacobs, Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] E.C.R., p. 2609 (2630)

309 Art. 5 (c) (1) of Regulation 804/68, as amended by Council Regulation 856/84, O. J. 1984, L 90/10; in addition, a so-called butterfat calculation takes place

310 example UK, see, "How the dairy levy works", Milk Producer, October 1984, p. 15

were reformed in 1987[311]. The economic background was that of the ever increasing surpluses and stocks in 1986/87[312]. The idea of the new levy-calculation is to ensure that the levy falls most heavily on those who exceed their quota by the most. According to Art. 5 (c) (1) of Regulation 804/68[313], only a certain proportion of the whole amount of exceeded reference quantities is liable. For this proportion, however, the full rate of the levy must be paid. This proportion is calculated by determining which producers exceeded their reference quantities by the most[314]. Apart from this mandatory regulation, Member States were authorized to enforce the financial responsibility of the producers by facultative provisions such as only making certain categories of producers profit from the equalization[315].

2. Regional and national equalization under both Formulas

In 1985, the Council enacted provisions which allow an offsetting under both Formulas[316]. According to the Regulation, Member States may allow equalization between producers or purchasers of one region (so-called regional equalization) and, if necessary, between producers or purchasers of different regions (so-called national equalization). Thus, the equalization which already existed under Formula B was generalized[317] and it is not necessary to pay a levy if the national guaranteed quantity is not exceeded[318]. The levy system is "nationalised" in that the amount of the payable levy no longer depends only on the situation of over- and underdeliveries of the purchaser a producer belongs to but also on the situation in the whole Member State[319]. The economic background of the reform is the phenomenon of the "dead quotas"[320]. "Dead quotas" are

311 Preamble of Regulation 773/87, O. J. 1987, L 78/1

312 Agra-Europe (ed.), The failure of milk quotas, (1986) Agra Briefing, No. 12, p. 24

313 as amended by Council Regulation 773/87, O. J. 1987, L 78/1

314 In the UK, the so-called "treshold principle" is used; see "The new superlevy system", Milk Producer, February 1987, p. 20

315 Art. 5 (c) (1) of Regulation 857/84, as amended by Council Regulation 773/87, O. J. 1987, L 78/1

316 Council Regulation 590/85, O. J. 1985, L 68/1

317 Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 7

318 Sorasio, D., (1988) Revue du marché commun, No 313, p. 13

319 see Sorasio, D., (1985) Revue du marché commun, No 291, p. 546

320 ONILAIT, Quotas laitiers, un bilan, p. 8

those reference quantities of the national guaranteed quantities that could not be used during one twelve-month period. In particular France had urged for this reform[321]. This possibility was initially introduced for the first twelve-month period[322] and has been prolonged since then[323].

Those Member States who do not implement the facultative provision[324] of regional and national equalization may use the collected levy for the purpose of financing national out-goer schemes, if the quantities delivered or sold in the twelve-month period in question do not exceed the national guaranteed total[325].

II. Amount of the levy

The amount of the levy was intially 100 % of the target price for purchasers under Formula B and 75 % for producers under Formula A and direct sellers[326] in order to avoid discriminations between Formula A and B producers[327]. Under Formula A, in the third twelve-month period the amount of the levy was set at 100 % of the target price[328]. In 1989, the Council decided to increase the amount of the levy to 115 % of the target price for both Formulas[329].

The levy is thus set at a level which may exceed the guaranteed support price, and it constitutes a penalty[330]. The levy which is paid yearly by the

321 Rép. min. Agriculture et Forêt, J. O. Débat Sénat, 24. 1. 1985, (1986) Revue de droit rural, No 134, p. 251

322 Council Regulation 590/85, O. J. 1985, L 68/1

323 until the ninth twelve-month period see Council Regulation 817/92, O. J. 1992, L 86/5

324 Sorasio, D., (1985) Revue du marché commun, No 291, p. 546; facultative version introduced by correction of Council Regulation 590/85, see O. J. 1985, L 73/31

325 Art. 5 (5) subparagraph 2 of Council Regulation 804/68, as amended by Council Regulation 1298/85, O. J. 1985, L 137/5 and Art. 9 (4) of Regulation 857/84 as amended by Council Regulation 1305/85, O. J. 1985, L 137/12

326 Art. 1 (1) of Regulation 857/84

327 see Preamble of Regulation 857/84; Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 9; Gadbin, D.; Charles-Le-Bihan, D., (1985) Revue de droit rural, No 131, p. 73

328 Art. 1 (1) of Regulation 857/84 as amended by Council Regulation 774/87, O. J. 1987, L 78/3

329 valid from the seventh twelve-month period onwards, see Council Regulation 3880/89, O. J. 1989, L 378/3

330 Usher, J. A.; Legal Aspects of Agriculture in the European Community, p. 37

producers or purchasers is used to cover the costs of the disposal of the exceeding quantities[331]. The levy system thus has introduced a financial responsibility of the producers for the marketing of exceeding quantities[332].

331 Art. 5 (c) (5) of Regulation 804/68, as amended by Council Regulation 865/84, O. J. 1984, L 90/10; Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 5; Burrel, A., Milk quotas in England and Wales, p. 1

332 Gadbin, D., (1985) Revue de droit rural, No 138, p. 510; Ehle, D.; Abgaben und Erstattungen, in: Kruse, H. W. (ed.), Zölle, p. 243

Chapter III

Implementation of the quota Regulations in English Law[333]

A. Agricultural policy and quota policy

I. Agricultural policy

The UK has been a significant net importer of agricultural products[334] and a net contributor to the European budget. For these reasons, despite surplus production in the EEC, further expansion of farm output has been proclaimed since the UK joined the Community[335]. The UK government has always favoured a moderate price policy in the EEC, also because of its concern for constraint on public spending[336]. Traditionally, the most important goal of British agricultural policy was not income support, but the increase of productivity and low consumer prices. This is also due to favourable farm structures and a considerable degree of efficiency[337]. In 1987, the average number of ha per farm in the UK was 68, 9, in France 30, 7, in Germany 17, 6 and in Europe 16, 5[338].

333 Direct sales are not treated. The system explained is the English and Welsh system, because for Scotland and Northern Ireland, slightly different rules exist, partly because of the different legal systems and partly because of different milk production structures. The principles, however, apply to Scotland and Northern Ireland as well. Only general features can be examined, a "pursuit" of every litre of milk that is subject to the levy system proved to be unmanageable

334 Hodge, I., The Changing place of Farming, in: Britton, D. (ed.), Agriculture in Britain, p. 36

335 Trede, K.-J., Vereinigtes Königreich, in: Priebe, H.; Scheper, W.; von Urff, W. (eds.), Agrarpolitik in der EG, p. 94; Blumenthal, M., (1984) 35 N.I.L.Q., p. 28

336 Neville-Rolfe, E., British Agricultural Policy, in: Britton, D. (ed.), Agriculture in Britain, p. 179

337 Blumental, M., (1984) 35 N.I.L.Q., p. 28

338 Commission of the European Communities, The Agricultural Situation in the Community, 1991 Report, T/123 and 124

II. Quota policy

Both the average yield per cow and average number of cows per farm are highest in the UK (see Annex). In the UK dairy sector, there are regional differences between Northern Ireland, Scotland and England and Wales. In 1984, in Scotland, the average size of the herds was 90 cows per herd, with the Aberdeen and District having 118 cows per herd, in Northern Ireland 36 cows per herd and in England and Wales the average size was 67[339]. In 1983/84, the average milk yield per cow was 4 950 litres in England and Wales, 4 970 litres in Scotland and 4 850 in Northern Ireland[340].

In 1984, the Milk Marketing Boards adamantly opposed quotas and so did the National Farmers' Union (NFU) and Country Landowners' Association[341]. The British government, with the support of the MMB pressed for significant price cuts[342]. The UK reached their main political goal during the discussion on the reform of the dairy market, budgetary discipline and a restrictive price policy. The demand of detaching quotas from land could not be enforced[343]. Detaching quotas from land and making them tradeable has been pleaded for by British farm and producers' organizations since the beginning[344]. Some even advocate that quotas should be tradeable across national borders[345].

One of the reasons for these demands is that the efficient British milk industry was about to expand during the 1980s largely because the British milk market remained under-supplied by home production[346]. The degree of self-sufficiency is low, amounting to 74 % concerning cheese and

339 The Federation of the UK MMBs, UK Dairy Facts & Figures, 1991 edition, p. 38

340 The Federation of the UK MMBs, UK Dairy Facts & Figures, 1991 edition, p. 40

341 de Salis, W., (1984) 36 Country Landowner, No. 7, p. 8; News from the NFU, 22 November 1984, p. 2

342 Agra-europe 44/83, Europa-Nachrichten, p. 15

343 Josling, T.; Moyer, W. H., Agricultural Policy Reform, p. 77

344 Hélin, F., (1987) Revue de droit rural, No 158, p. 469; Swarbrick, R., (1984) 36 Country Landowner, No. 6, p. 34; Amies, S. J., Transfer of Milk Quotas in England and Wales, in: Burrel, A. (ed.), Milk Quotas in the European Community, p. 159: Carter, D., (1991) 36 Farmland Market, p. 13; NFU, Briefing, 27 February 1991, p. 3

345 The MMB of England and Wales, Five Years of Milk Quotas, p. 23

346 Swarbrick, R., (1984) 36 Country Landowner, No. 6, p. 34; Burrel, A. (1988) Cahiers d'économie et sociologie rurales, No. 7, p. 94

77 % concerning butter in 1983[347]. New entrants and expanding farmers were important to supply to the milk market[348]. Restructuring the milk industry was only a minor issue of the British quota policy because most of the farms already had a high level of productivity in comparison to other European competitors. This level was hoped to be maintained by transfer of quotas[349]. Out-goer schemes were even seen as disturbing transfer operations[350].

Annex: Average number of cows per farm and yield per cow in 1984 and 1989/90[351]:

	Average number of cows per farm			Average yield per cow/kg	
	1984	**1989**		**1984**	**1990**
Germany:	13,9	16,3	Germany:[352]	4 622	4 909
France:	16,8	20,8	France:	3 969	4 928
UK:	57,1	66[353]	UK:	4 804	5 197
Europe:	15,7[354]	17,1[355]	Europe:[356]	4 285	4 769

347 France: 116 % for chesse, 131 % for butter, Germany: 96 % for cheese, 155 % for butter, Commission of the European Communities, The Agricultural Situation in the Community, 1985 Report, p. 250

348 de Salis, W., (1984) 36 Country Landowner, No. 3, p. 26

349 Burrel, A. (1988) Cahiers d'économie et sociologie rurales, No. 7, p. 94

350 Milk Producer, October 1987, p. 12

351 Source: CNIEL, L'économie laitière en chiffres, édition 1991, p. 13, 1O7, 109, (figures for 1990 are estimated) Bundesregierung (ed.), Agrarbericht 1990, p. 12, The Federation of the UK MMBs, UK Dairy Facts & Figures, 1991 edition, p. 38; Commission of the European Communities, The Agricultural Situation in the Community, 1991 Report, T/116

352 without the five new "Länder"

353 number of dairy cows per herd

354 comprising 10 Member States

355 comprising 12 Member States

356 comprising 10 Member States

B. Legal acts incorporating the EEC milk quota Regulations into English Law

On the 24th of July 1984, the Minister of Agriculture, Fisheries and Food and the Secretaries of State for Wales and Scotland elaborated so-called Dairy Produce Quotas Regulations (DPQR 1984)[357] based on section 2 (2) (b) of the European Communities Act 1972[358]. Section 2 (2) (b) of the Act authorizes the competent authorities to pass necessary subordinate legislation in order to incorporate EEC Regulations[359]. Regulations enacted under the European Communities Act have to be elaborated in the form of statutory instruments[360]. The DPQR have been revoked several times. The actual regulations considered are The Dairy Produce Quota Regulations 1991 (DPQR 1991)[361].

C. Institutions charged with the application of the milk quota Regulations

There are three principal institutions charged with the application of the DPQR: the Ministry of Agriculture, the Intervention Board for Agricultural Produce (IBAP) and the Milk Marketing Boards (MMBs).

The UK is a centralized state with decentralized territorial administration[362]. Administration is carried out in the UK by either the Crown or by other administrative authorities which are for the most part local government authorities, the police and public corporations[363]. Public corpo-

357 S.I. 1984/1047

358 Halsbury's Statutes of England, vol. 17, p. 28 et seq; Sources of law are the case law (English law) and statute law. English law is divided up into common law and equity. Statute law consists of subordinate legislation like Regulations and Orders and Acts of Parliament (statutes); David, R.; Brierley, J. E. C., Major legal systems, p. 366; Jones, B. L., Garner's administrative Law, p. 57 et seq

359 as opposed to EEC directives, see European Communities Act 1972, s 2 (2) (a); Notes to Section 2 of the European Communities Act 1972, Halsbury's Statutes of England, vol. 17, p. 32

360 European Communities Act 1972, Sch 2, para 2 (1), see Statutory Instruments Act 1946, Halsbury's Statutes of England, vol. 41 requiring special procedural rules

361 S.I. 1991/2232; where necessary, reference is made to revoked Dairy Produce Quotas Regulations; the DPQR 1991 are actual law of January 1992

362 Loewenstein, K., Staatsrecht und Staatspraxis in Großbritannien, vol. 2, p. 131; Scotland and Northern Ireland are treated as special regions

363 Yardley, D. C. M., Principles of administrative Law, p. 5

rations are autonomous bodies, having corporate personality and established with specific tasks to perform[364].

I. Ministry of Agriculture and IBAP

As far as agriculture is concerned, the central government, namely the Ministry of Agriculture, Fisheries and Food[365], to a large degree administers agricultural subject matters. The local governments are only charged with the agricultural administration to a lesser extent[366]. The Intervention Board for Agricultural Produce (IBAP), set up under the European Communities Act 1972, is a public corporation[367]. It is charged with the performance of obligations of the UK under the CAP and is subject to the control and direction of Ministers[368].

II. Milk Marketing Board

Under the Agricultural Marketing Act 1931 and 1933, the creation of so-called marketing boards for certain commodities was envisaged[369]. The Milk Marketing Board for England and Wales was set up by the 1933 Milk Marketing Scheme[370]. Marketing Boards were supposed to overcome the lack of development of voluntary UK producers co-operatives and to create a strong producers' bargaining position during price negotiations in order to ensure producers' incomes, which were low in the 1930s[371].

364 Jones, B. L., Garner's administrative Law, p. 24

365 there are Agricultural Departments for Scotland and Wales, if functions are exercised for Great Britain as a whole, the MAFF and the Secretary of State for Scotland and the Secretary of State for Wales act jointly; see Stansfield, J. O., Halsbury's Laws of England, vol. 1 (2), p. 582

366 see Jones, B. L., Garner's administrative Law, p. 468

367 see Jones, B. L., Garner's administrative Law, p. 354 et seq; European Communities Act 1972, s 6 (1)

368 European Communities Act 1972, s 6 (1)

369 Anderson, P. D., (1978) 5 Agricultural Administration, p. 60

370 The other four Milk Marketing Boards were created at almost the same time; see Anderson, P. D., (1978) 5 Agricultural Administration, p. 71, Footnote 2

371 Whetstone, L., The marketing of milk, p. 9; Anderson, P. D., (1978) 5 Agricultural Administration, p. 60; Hollingham, M. A.; Howarth, R. W., British Milk Marketing, p. 37

All producers subject to a Board Area[372] of one of the five British MMBs and who wish to offer milk for sale must register with the MMBs[373]. The MMBs have the exclusive right to purchase all milk offered for sale in bulk by registered producers and has the obligation to take up that right provided the milk is of marketable quality[374]. To this purpose, the MMBs dispose of statutory powers such as regulating the quality of the milk which may be sold, the prices at and the persons to and through whom the milk may be sold[375]. The collection and transport of milk from the farms to the first destination is the responsibility of the MMBs[376]. Moreover, the MMBs maintain the only official milk recording scheme[377].

The legal nature of the Marketing Boards is ambiguous. Because only some of the members of the Board, which is the policy-making organ, are appointed by the government and the rest are elected by registered producers, they are not pure public corporations[378], but miscellaneous bodies[379]. Because of the compulsory registration, the MMBs are compulsory producers' marketing co-operatives[380].

After the UK joined the European Community in 1972, the structure and the functions of the MMBs could only be maintained because of exceptional Community Regulations[381]. However, the monopoly of purchasing fresh milk and the pricing system[382] of the MMBs as well as

372 The Milk Marketing Schemes do not apply to a few Scottish Islands, the Isles of Scilly and both the Isle of Man and the Channel Islands; see The Federation of UK MMBs, UK Dairy Facts & Figures, 1991 edition, p. 12, Anderson, P. D., (1978) 5 Agricultural Administration, p. 590

373 The Federation of the UK MMBs, UK Dairy Facts & Figures, 1991 edition, p. 11

374 Whetstone, L., The marketing of milk, p. 9; The Federation of the UK MMBs, ibid, p. 11; Rodgers, C. P., Halsbury's Laws of England, vol. 1 (2), p. 449

375 Rodgers, C. P., Halsbury's Laws of England, vol. 1 (2), p. 447; Burrel, A., (1988) Cahiers d'économie et sociologie rurales, No. 7, p. 78

376 Anderson, P. D., (1978) 5 Agricultural Administration, p. 66

377 Anderson, P. D., (1978) 5 Agricultural Administration, p. 133 et seq

378 Members of public corporations are appointed by public authorities; see Jones, B. L., Garner's administrative Law, p. 354

379 Jones, B. L., Garner's administrative Law, p. 369

380 Anderson, P. D., (1978) 5 Agricultural Administration, p. 131

381 Council Regulation 1422/78, O. J. 1978, L 171/14; Commission Regulation 1565/79, O. J. 1979, L 188/29; see Rodgers, C. P., Halsbury's Laws of England, vol. 1 (2), p. 446

382 so-called price discrimination or multiple-pricing and pooling price; see Whetstone, L., The marketing of milk, p. 21; MAFF (ed.), At the farmer's service, p. 53; Hollingham, M. A.; Howarth, R. W., British Milk Marketing, p. 36, 197

the links between the government and the MMBs have been questioned by both Community authorities[383] and the producers. Recently, a fierce debate has been taking place in the UK on whether the compulsory form of the MMBs should be abolished[384].

D. Observance of national guaranteed quantity when allocating reference quantities

The UK managed not to exceed their national guaranteed total when allocating reference quantities[385]. The legal rules determining the allocation will be considered.

I. Allocation of reference quantities to regions, purchasers and producers

For the purpose of implementing the EEC milk quota Regulations, the United Kingdom has been divided up into regions[386]. The regions comprise firstly the five MMB regions which are England and Wales, three Scottish regions and Northern Ireland[387] and secondly a number of small regions, varying during the campaigns, that are not subject to a MMB area[388]. In each of these regions, the Formula B applies[389]. The national guaranteed quantity for the UK, called national wholesale quota[390], has

383 The Commission has, e.g., begun infringement proceedings against the UK, because the Board exercises its exclusive purchasing powers also over low fat milk; Case C-40/92 R injunction, Commission of the European Community v United Kingdom, not yet reported

384 Gummer, J., MAFF News Release, 6 November 1991, p. 1; News from the NFU, 7 March 1991, p. 1

385 see Court of Auditors, Special Report No 2/87, O. J. 1987, C 266/11

386 DPQR 1984 (S.I. 1984/1047), reg 5 (2)

387 see Pinfold, E., (1985) 82 LS Gaz, No 17, p. 1307

388 namely Islands and Kintyre; Orkney, Shetland; Isles of Scilly; see The Federation of the UK MMBs, UK Dairy Facts & Figures, 1991 edition, p. 68; 1989 edition, p. 67; the Minister may change the regions in each campaign, see DPQR 1984 (S.I. 1984/1047), reg 5 (2), (3); DPQR 1991 (S.I. 1991/2232), reg 6

389 DPQR 1991 (S.I. 1991/2232), reg 4; The MMB of England and Wales, Five Years of Milk Quotas, p. 9; In the first quota year, Formula A applied in Northern Ireland and the Isles of Scilly, see Apsion, G., Milk Quotas, Law, Tax and Practice, p. 49

390 DPQR 1984 (S.I. 1984/1047), reg 2 (1)

been divided proportionately between the regions[391]. Wholesale means that the whole of milk is sold to purchasers by the producers[392] in contrast to direct sales. The regional quotas are allocated to the purchasers of the regions[393], which in most cases are the MMBs[394]. In 1984, the purchasers allocated reference quantities to the producers based on their 1983 milk production less nine per cent[395].

II. Allocation of reference quantities for producers in special situations

The categories of producers in special situations that were allocated additional or specific reference quantities changed during the various campaigns[396]. Most of the categories envisaged by the European Regulations have been taken into account, except for farmers who realized a milk development plan after Regulation 857/84 entered into force and young farmers[397]. In particular, so-called "development claims" could be made if producers invested in dairy facilities before 1984[398].

For the purpose of allocating reference quantities to producers in special situations, a national reserve[399], regional[400] and regional running wholesale reserves[401] were created. Reference quantities that are not al-

391 Pinfold, E., (1985) 82 LS Gaz, No 17, p. 1307; so-called regional wholesale quota; DPQR 1984 (S.I. 1984/1047), reg 5 (2) (3); the amounts may be changed in every milk year by the Minister, see DPQR 1984 (S.I. 1984/1047), reg 5 (2), (3); DPQR 1991 (S.I. 1991/2232), reg 6

392 Pinfold, E., ibid, p. 1307

393 so-called purchaser wholesale quota; DPQR 1984 (S.I. 1984/1047), reg 2 (1)

394 The Federation of the UK MMBs, UK Dairy Facts & Figures, 1991 edition, p. 59; only producers who are not subject to a MMB area may sell their milk to purchasers other than the MMBs, see above; Apsion, G., Milk Quotas, Law, Tax and Practice, p. 5

395 so-called primary wholesale quota or basic quota; DPQR 1984 (S.I. 1984/1047), Sch 2, para 4 (c) with different deductive percentages for parts of Scotland; see DPQR 1984 (S.I. 1984/1047), Sch 2, para 4 (c); Burrel, A., Milk quotas in England and Wales, p. 1

396 e.g. in 1985, a "small producer provision" was introduced, see DPQR 1985 (S.I. 1985/509), reg 8, Sch 6 and in 1986, a "general wholesale provision", see DPQR 1986 (S.I. 1986/470), reg 19

397 Usher, J. A., Legal Aspects of Agriculture in the European Community, p.77

398 DPQR 1984 (S.I. 1984/1047), Sch 2, para 7; Apsion, G., Milk Quotas, Law, Tax and Practice, p. 4

399 The Federation of the UK MMBs, UK Dairy Facts & Figures, 1991 edition, p. 57

400 Apsion, G., Milk Quotas, Law, Tax and Practice, p. 3

401 DPQR 1984 (S.I. 1984/1047), reg 16, Sch 2; DPQR 1984 (S.I. 1984/1047), Sch 2, para 16; Milk (Cessation of Production) Act 1985, s 1 (2) (b)

located among the regions supplement the national reserve, a proportion of producers' quotas that was left apart in the beginning was added to the regional reserve[402] and quantities released in out-goer schemes are added to the running regional reserves.

In 1984, it turned out that the litres awarded to the producers who had applied for additional and specific quotas outstripped the quantities available in the regional reserves. Subsequently, all extra allocations were scaled down apart from one category of producers which was honoured in full[403]. Only 64,7 per cent of litres awarded under successful development claims were allocated initially[404]. In 1985/86, more litres released by out-goer schemes could be allocated to increase the specific and additional quotas. The "Nallet" quota established by the Community in 1989[405] was allocated partly to producers with a development award so that development awards could be scaled up to 80 % in 1989[406]. The allocation of additional and secondary quota in the UK thus depended on how many quotas were available. This was true for all categories of producers in special situations because the Minister would make a provision once reference quantities were available for producers in special situations[407].

E. Implementation of Formula B

The five above-mentioned regions of England and Wales, Scotland and Northern Ireland in which Formula B was implemented were deliberately chosen because they represent the regions of the five British MMBs. In the case of the UK, purchaser thus meant the first purchaser of milk from the farmer. The administrative structure provided by the MMBs was ideal

402 2,8 %, see The MMB of England and Wales, Five Years of Milk Quotas, p. 9; MAFF (ed.), Milk production before and after quotas, p. 50

403 the so-called exceptional hardship claim; DPQR 1984 (S.I. 1984/1047), Sch 2, para 17 (2)

404 The MMB of England and Wales, Five Years of Milk Quotas, p. 9; Usher, J. A., Legal Aspects of Agriculture in the European Community, p. 77; The MMB of England and Wales, Five Years of Milk Quotas, p. 27

405 see second chapter, C. I.

406 The Federation of the UK MMBs, UK Dairy Facts & Figures, 1991 edition, p. 58

407 in 1985 for example a "small producer provision"; see DPQR 1985 (S.I. 1985/509), reg 8, Sch 6

for the administration of the milk quota system[408]. Because every litre of milk sold by producers passed through the tanks and registers of the MMBs, Formula B was the suitable Formula[409]. However, the most important argument in favour of Formula B was that the super-levy was only payable if the whole of one Board area exceeded its purchaser quota[410]. This would be particularly ideal in the huge area of England and Wales.

I. Diversity of milk production structure; equalization

For the purpose of levy calculation, in the huge area of the Milk Marketing Board of England and Wales over- and underdeliveries are equalized within the Board area[411]. In fact, before Formula B was reformed in 1987/88, the producers in the English and Welsh region had to pay only a low fraction of the levy rate[412], amounting, for example to 0.8 % of the target price in 1985/86[413]. The national and regional equalization is carried out by the Minister[414] with the help of the MMB data[415]. The Ministry calculates the levy[416], the MMBs as purchasers and debtors collect the levy from the producers and are liable for payment of the levy to the Intervention Board for Agricultural Produce[417].

408 The MMB of England and Wales, Five Years of Milk Quotas, p. 9; Hélin, F., (1987) Revue de droit rural, No 158, p. 468

409 Harvey, D. R., Milk quotas, p. 27

410 Harvey, D. R., Milk quotas, p. 27; Burrel, A., (1988) Cahiers d'économie et sociologie rurales, No. 7, p. 80

411 The Federation of the UK MMBs, UK Dairy Facts & Figures, 1991 edition, p. 60, for the threshold system practised in the UK see, Milk Producer, Februray 1987, p. 20; This equalization is also true for the other Board areas

412 see The MMB of England and Wales, Five Years of Milk Quotas, p. 38; Burrel, A., (1988) Cahiers d'économie et sociologie rurales, No. 7, p. 80

413 Court of Auditors, Special Report No 2/87, O. J. 1987, C 266/19

414 DPQR 1985 (S.I. 1985/509), reg 9 D implementing Art. 4 (a) of Regulation 857/84, DPQR 1991, (S.I. 1991/2232), reg 21, Sch 8

415 Interview in the MAFF with M. Thomas and F. Nash, 15th of January 1992

416 DPQR 1991 (S.I. 1991/2232), reg 21, Sch 8

417 DPQR 1991 (S.I. 1991/2232), reg 23, according to reg 25 (2), the MMB and the IBAP may enter into an agreement providing for the discharge by the MMB of any functions of the IBAP (like fat calculation); however, for the levy payment as such there is no agency agreement; see The Federation of the UK MMBs, Dairy Facts & Figures, 1991 edition, p. 61

Unequal treatment between producers within one Board area did not emerge; however, between the five Board areas, there are slight differences of levy rates[418]. In Northern Ireland, there have been fewer overdeliveries during the campaigns than in the English, Welsh and Scottish Board areas[419]. Since 1989, at the end of the campaign the Minister has been able to temporarily re-allocate unused reference quantities of one purchaser to producers in special situations of the same purchaser; consequently, inequalities between producers in special situations might be avoided[420].

II. Administrative viability

The MMBs administer the whole of the quota system. They calculate yearly the individual reference quantities and the producers' levy, including the cut and suspensions, register all producers and their amount of quota in a quota register[421], collect the levy and pay it to the IBAP. They operate the leasing schemes, and all transfers of quotas have to be indicated to them and they have to register them. They keep the producers informed through their monthly detailed quota analysis in their periodical "Milk Producer". The MMBs perform these tasks on behalf of the Ministry of Agriculture, Fisheries and Food under an agency agreement and they are supervised by the Ministry[422]. The Ministry is responsible for all decisions taken by the MMBs as their agents.

As far as additional and specific quotas were concerned, the producers were subject to a deadline when they applied for them[423]. Either local

418 see The Federation of the UK MMBs, Dairy Facts & Figures, 1991 edition, p. 69; 1989 edition, p. 63; the levy rate the producers paid in the small regions which fall outside of the Board areas have not been considered in this research

419 see for 1987-1990, The Federation of the UK MMBs, Dairy Facts & Figures, 1991 edition, p. 69

420 DPQR 1989 (S.I. 1989/380), reg 16

421 see DPQR 1984 (S.I. 1984/1047), reg 13 (2) and DPQR 1991 (S.I. 1991/2232), reg 28

422 DPQR 1991 (S.I. 1991/2232), reg 26 (1); see Gregory, M.; Sydenham, A., Essential Law for Landowners & Farmers, p. 117 ; The agency agreement has not been published and is confidential (Interview in the MAFF with M. Thomas and F. Nash, 15th of January 1992)

423 in 1984, application had to be made by August 28, 1984, DPQR 1984 (1984/1047), Sch 2, para 7; Apsion, G., Milk Quotas, Law, Tax and Practice, p. 39; for exceptional hardship claim, which has to be made to the Tribunal, see

divisional offices of the Ministry of Agriculture or so-called Dairy Produce Quotas Tribunals[424] were responsible for their application. Dairy Produce Quotas Tribunals have also been established to consider appeals against allocation of primary quota[425] and their so-called local panels for the review of special case claims[426].

F. Transfer of reference quantities

I. Quota markets

In England and Wales, a veritable market of quotas emerged soon after the introduction of the super-levy system[427]. The quota is a tradeable asset of its own. This is verified by the prices paid in pence per litre for both transferred and leased quotas[428]. In England and Wales, in 1984/85, 0.7 % and in 1985/86, 3.1 % of the national guaranteed quantity were transferred, in 1986/87, 6.3 % , in 1987/88, 7. 8 % and in 1988/89, 6.8 % of the national quota were transferred or leased out[429]. By contrast, the success of the out-goer schemes has been modest[430], only 2.6 % of the total 1984/85 reference quantity was released in five years in the UK, in comparison to France, where 11.5 % of the total 1984/85 was released in

DPQR 1984 (S.I. 1984/1047), Sch 2, para 17 (4); for small producers see DPQR 1985 (S.I. 1985/509), Sch 6, para 7

424 as regards exceptional hardship quota; DPQR 1984 (S.I. 1984/1047), Sch 2, para 17 (5)

425 after unsuccessful objection to the Minister, DPQR 1984 (S.I. 1984/1047), Sch 2, para 6 (1), (4)

426 comprising the so-called base-year revision claims and development claims, DPQR 1984 (S.I. 1984/1047), reg 2 (1) implementing Art. 3 (1) and (3) of Regulation 857/48; DPQR 1984 (SI 1984/1047), reg 6 (2), Sch 5; DPQR 1984 (S.I. 1984/1047), Sch 2, para 8 (6) (8); para 9; after rejection, appeal was allowed to the Dairy Produce Quotas Tribunals; DPQR 1984 (S.I. 1984/1047), Sch 2, para 9 (6)

427 MAFF (ed.), Milk production before and after quotas, p. 50; Crosseley, G., (1985) 24 Farmland Market, p. 16; Sweeney, J., (1987) 28 Farmland Market, p. 10; Crossley, G., (1985) 23 Farmland Market, p. 15; Burrel, A. (1988) Cahiers d'économie et sociologie rurales, No. 7, p. 94

428 see for example The MMB of England and Wales, Five Years of Milk Quotas, p. 44

429 see The MMB of England and Wales, Five Years of Milk Quotas, p. 44

430 Oskam, A. J. et al, The superlevy - Is there an alternative?, p. 39 et seq; The MMB of England and Wales, Five Years of Milk Quotas, p. 28

the first four years[431]. Out-going producers in the UK kept the quotas and used their capital value by leasing them out or even selling them[432]. Hence, the value of quota is not only recognizable by increased land prices and rents, but the quota itself has been given a value[433]. Brokers and auctioneers arrange the transfers of quotas by large advertisements in the farming press without any hint to land transactions[434]. Under which legal schemes such a market could develop will be explored.

II. Conditions for the transfer of reference quantities

1. Transactions of the holding or parts of it that entail the transfer of reference quantities

When incorporating Art. 7 of Regulation 857/84, the English legislator had to define all transactions concerning holdings or parts of it that entail the transfer or reference quantities.

Under English land law, both estates and interests (except lease) in land are real property[435]. The transactions that under English law affect legal estates or interests in land and thus property do not necessarily result in a change of occupation[436]. According to English lawyers, the English legislator therefore had to define the legal operations entailing the transfer of reference quantities in such a way as to adapt the common law to the continental approach enshrined in Art. 7 of Regulation 857/84[437].

431 Dillen, M.; Tollens, E., Milk Quotas, vol. 1, p. 22; the success or failure is also due to the conditions of the schemes, the conditions in France were more favourable; see Dillen, M.; Tollens, E., ibid, p. 22

432 Dillen, M.; Tollens, E., Milk Quotas, vol. 1, p. 25; The MMB of England and Wales, Five Years of Milk Quotas, p. 15

433 for land prices see Crossely, G., (1985) 23 Farmland Market, p. 15

434 Burrel, A., (1988) Cahiers d'économie et sociologie rurales, No. 7, p. 92; see Farming News, January 10th 1992, p. 22: "Specialist Quota Broker offers complete professional service with the necessary legal documents"

435 Riddal, J. G., Introduction to Land Law, p. 48; James, P. S., Introduction to English Law, p. 421; In England, all land is still held from the Crown by tenure. The duration of a tenancy is termed the estate for which the tenant holds the land. Interests in land are rights and duties, liabilities and obligations connected with the land, present or future, directly or under trust. A lease is an interest in land and so are mortgages. Riddal, J. G., Introduction to Land Law, p. 21; Pinfold, E. (1985) 82 LS Gaz, No 17, p. 1307

436 Muir Watt, J., Agricultural Holdings, p. 226

437 Pinfold, E., (1985) 82 LS Gaz, No 17, p. 1307

a) "Transfer" and "change of occupation"

According to the British quota rules, every transfer of a holding or parts thereof which implies a change of occupation is a transaction entailing the transfer of reference quantities[438].

Under English land law, there are principally two forms of holding land by farmers[439]: the freehold land owned by the landlord (so-called owner-occupier[440]) and the tenanted land owned by the landlord, but farmed by a tenant.

Because tenancy arrangements and grazing licences were mostly important for transferring quotas, other transactions such as sales will not be treated[441].

aa) Leases and grazing and/or mowing licences

A tenancy is a lease[442]. Leases are contracts but also interests in land and leases give by definition an exclusive right of possession[443]. Most of the types of tenancy contracts are protected by the Agricultural Holdings Act 1986 in that they give security of tenancy[444].

Apart from tenancies, there are extremely short-term agreements that can be concluded such as a grazing or mowing licence[445]. Licences, as opposed to leases or tenancies, do not give the licensee an interest in the land which would entitle him to exclude all other persons from the premises but are mere contracts[446]. The signor of a grazing licence has, moreover, no guarantee that the land or its replacement will be available

438 DPQR 1984 (S.I. 1984/1047), Sch 2, para 8; DPQR 1991 (S.I. 1991/2232), reg 8

439 other interests like mortgages or interests under trusts will not be treated in this report; see e.g. Pinfold, E., (1985) 82 LS Gaz, No 17, p. 1307

440 under English law, he must correctly be described the holder of a fee simple, because all land is held by the Crown, by tenure, see Riddal, J. G., Introduction to Land Law, p. 50

441 see MAFF, Discussion paper on Quota Mobility, published in: House of Commons, Session 1984-1985, Second Report of the Agriculture Committee, Annex VII, London 1985, p. xxii

442 Riddal, J. G., Introduction to Land Law, p. 262; as to the terminology, lease and tenancy are in law both the same creature, see Riddal, J. G., ibid, p. 44

443 James, P. S., Introduction to English Law, p. 424; Rodgers, C. P., Agricultural Law, p. 29; Riddal, J. G., Introduction to Land Law, p. 255

444 Rodgers, C. P., Agricultural Law, p. 32; for meaning of security of tenancy see G. I.

445 Hill, B., (1985) 19 Agricultural Administration, p. 193

446 Riddal, J. G., Introduction to Land Law, p. 257

for the following season[447] because a licence is generally not protected by the Agricultural Holdings Act. A grazing licence is often referred to as a "sale of the grass keep"[448].

At the beginning, there was considerable uncertainty concerning which transactions, other than a disposal of the freehold or part of the freehold, would enable reference quantities to be transferred[449]. In particular, it was not clear whether grazing and/or mowing agreements would be sufficient if they gave no exclusive right of possession. The reason for the uncertainty was that neither a "transfer" nor "change of occupation" are precisely defined in the regulations[450]. The definitions of transferee or transferor were useless, because the "transferor" and "transferee" of milk quotas are, respectively, defined as the persons replacing and the persons becoming, the "occupier" of a holding or part therof[451]. Occupier was not defined in the initial regulations.

bb) Transfer of reference quantities by short-term agreements

In practice, extremely short-term grazing and/or mowing agreements were used to transfer quotas permanently and parts of holdings temporarily in the following way: because milk quotas are transferred if areas used for milk production are transferred, the transferee did not use the transferred land for milk production but, for example, for grazing sheep. On restitution of these areas, they were consequently no longer areas used for milk production and thus no longer had quotas attached to them[452].

These short-term arrangements were legal under the initial DPQR, because both a transfer and a change of occupation took place. Their accordance with Community law, however, is doubtful. Though such an agreement would be a "lease" in the sense of Art. 7 of Regulation 857/84[453],

447 Hill, B., (1985) 19 Agricultural Administration, p. 193 et seq

448 Muir Watt, J., Agricultural Holdings Act 1986 with annotation, p. 5/2

449 Gregory, M.; Sydenham, A., Essential Law for Landowners & Farmers, p. 117

450 Rodgers, C. P., Agricultural Law, p. 314

451 DPQR 1984 (S.I. 1984/1047), reg 2 (1)

452 Rodgers, C. P., Agricultural Law, p. 318; The MMB of England and Wales, Five Years of Milk Quotas, p. 13; Amies, S. J., Transfer of Milk Quotas in England and Wales, in: Burrel, A. (ed.), Milk Quotas in the European Community, p. 158; Crossley, G., (1985) 23 Farmland Market, p. 15; for illustration : Milk Producer, May 1985, p. 1O

453 Muir Watt, J., Agricultural Holdings, p. 227, Footnote 12

the non-exclusive nature of the arrangement might encourage the transferee not to occupy the land.

In practice, in fact, misuse of the transfer rules occurred often. Agreements were frequently not followed through because the transferee never occupied the transferred land, although he disposed of the transferred quotas[454]. There was, apparently, a lack of control by the Ministry[455]. This practice clearly infringed Community law since the quotas are detached from land given that no genuine transaction of land takes place.

By 1984/85, the Commission had asked the Ministry of Agriculture to stop any rule-breaking from taking place[456]. Warnings from the Ministry, however, to investigate into quota transfers, were not taken very seriously by the producers[457]. Apparently, only the amendment of the DPQR, which was undertaken in 1988[458], could ensure compliance with EEC rules.

b) Reform of the Regulations - no "transfer" by definition

The purpose of the reform was to restrict the use of very short-term grazing agreements[459] by defining certain transactions that may, for the purpose of the application of the transfer rules, not be treated as "transfers". First of all, a licence to occupy land is not a transfer[460]. From this provision scholars deduce that all licences and agreements that do not confer exclusive rights of possession to the transferee and thus are not tenancies, will not result in a transfer of milk quotas[461]. Secondly, any tenancy of any land under which a holding, or part of a holding, in

454 Farming News, January 17th, 1992, p. 1; see Final award in an arbitration process of 14th November 1990, unpublished, delivered by arbitrator Rickard, T.R., FRICS (Fellow of the Royal Institution of Chartered Surveyors)

455 see Final award of 14th November 1990, unpublished

456 Hélin, F., (1987) Revue de droit rural, No 158, p. 471, Crosseley, G., (1985) 24 Farmland Market, p. 16; In 1987, the Court of Auditors pointed to the circumventing practices in the UK, see Special Report No 2/87, O. J. 1987, C 266/11 et seq

457 Crossley, G., (1985) 24 Farmland Market, p. 16; Milk Producer, February 1988, p. 11

458 DPQR (Amendments) 1988 (S.I. 1988/534), reg 5

459 Rodgers, C. P. Agricultural Law, p. 317 et seq; The MMB of England and Wales, Five Years of Milk Quotas, p. 29

460 DPQR (Amendents) 1988 (S.I. 1988/534), reg 8 (7) (a); DPQR 1991 (S.I. 1991/2232), reg 8

461 Rodgers, C. P., Agricultural Law, p. 3O7; Gregory, M.; Sydenham, A., Essential Law for Landowners & Farmers, p. 119

England and Wales[462] is occupied for a period of less than ten months does not entail the transfer of milk production quotas[463]. Thus, the use of grazing tenancies for quota transfers is restricted[464].

Currently, two kinds of tenancies that are not protected under the Agricultural Holdings Act 1986 are used for transfers[465]: Tenancies of more than one year and less than two (so-called Gladstone v Bower agreement[466]) and grazing and/or mowing tenancies if the let is for more than 10 months and less than 364 days[467].

The minimum time-limit introduced by the reform only prevents the transfer by using extremely short-term agreements, but the reform does not hinder misuse through longer-term agreements in which land is not occupied[468]. This is a question of control by the Ministry, which has indicated that it supervises whether genuine transactions have taken place and whether there is a change of occupation[469]. However, English lawyers allege that the Community Regulations do not make it clear whether the transferee really has to exercise his excluive right of possession[470].

After the introduction of the new regulations, the volumes of transfers decreased and the number of producers involved in leasing arrangements, increased[471].

462 DPQR (Amendments) 1988 (S.I. 1988/534), reg 8 (7) (c) (d): for Scotland eight months; for Northern Ireland twelve months, see also DPQR 1991 (S.I. 1991/2232), reg 8 (7) (c) (d)

463 according to DPQR (Amendments) 1988 (S.I. 1988/534), reg 8 (7) (b)

464 Rodgers, C. P., Agricultural Law, p. 317

465 Rodgers, C. P., Agricultural Law, p. 317; Gregory, M.; Sydenham, A., Essential Law for Landowners & Farmers, p. 119

466 according to a case : Gladstone v Bower (196O) 2 QB, p. 384

467 Agricultural Holdings Act 1986, s 3 (a); Halsbury's Statutes of England, vol. 1, p. 732 et seq

468 examples: (1992) Farming News, January 17th, p. 1; Carter, D., (1991) 36 Farmland Market, p. 12

469 Rodgers, C. P., Agricultural Law, p. 315

470 Rodgers, C. P., Agricultural Law, p. 318, thus contractor arrangements are concluded in practice

471 Figures for England and Wales, see The MMB of England and Wales, Five Years of Milk Quotas, p. 15

2. Temporary re-allocation of quotas

Because of high demands for quotas, leasing has been discussed largely in the UK since 1986[472]. Thus, quota leasing schemes operated by the MMBs have existed since 1986/87 in England and Wales[473], based on Art. 8 of Regulation 857/84 envisaging the management of milk quotas by the purchasers[474]. However, this interpretation of Art. 8 circumvents Art. 7 of Regulation 857/84 because Art. 7 did not initially allow any transfer between producers without land[475]. Moreover, short-term grazing agreements were also used in order to re-allocate milk quotas temporarily. After the authorization of leasing by the European legislator, the possibility of leasing between producers of one purchaser was introduced by the DPQR (Amendments) 1988[476].

Most of the quotas transferred permanently or temporarily were used to avoid super-levy liability[477]. However, it is not clear by which legal transactions the volumes enlisted above (under I.) were transferred permanently[478]. The development of quotas to a tradeable asset was presumably encouraged by the legal permanent transfers described above, by the illegal detachment of quotas of land and by leasing arrangements.

3. Formal requirements for transfer of reference quantities

The transferee shall notify the change of occupation to the Ministry, including information on the apportionment of the quotas and the holding or parts of it that is transferred[479]. However, under the agency agreement, the notification has to be made to the MMBs, which register the change of quotas[480]. The Minister takes a sample of transfers to make sure that the transfers are legal[481].

472 see Burrel, A., Milk quotas in England and Wales, p. 4
473 The MMB of England and Wales, Five Years of Milk Quotas, p. 27, p. 11
474 The MMB of England and Wales, Five Years of Milk Quotas, p. 8
475 Court of Auditors, Special Report No 2/87, O. J. 1987, C 266/12
476 S.I. 1988/534
477 The MMB of England and Wales, Five Years of Milk Quotas, p. 14
478 see Amies, S. J., Transfer of Milk Quotas in England and Wales, in: Burrel, A. (ed.), Milk Quotas in the European Community, p. 159
479 DPQR 1984 (S.I. 1984/1047), reg 8 (1) (a); DPQR 1991 (S.I. 1991/2232), reg 8, reg 11
480 Gregory, M.; Sydenham, A., Essential Law for Landowners & Farmers, p. 117 et seq
481 Rodgers, C. P., Agricultural Law, p. 318; interview in MAFF, January 1992

III. Transfer of reference quantities as legal effect

Quotas will be automatically transferred by operation of law, whether there is a contractual term or not[482], if the necessary conditions (see above) are fulfilled.

1. Transfer of reference quantities to the transferee

In the case of the transfer of an entire holding, all the reference quantities are transferred to the transferee[483].

If parts of a holding are transferred, quotas may be apportioned by agreement of the parties concerned[484]. If no agreement is reached, either the parties or the Ministry may refer the matter to an arbitrator[485]. The Ministry may refer to the arbitrator if he considers that the areas used for milk production on a holding are not those specified by the parties in the forms submitted to the MMBs[486].

The apportionment between parties must be made according to the areas used for milk production[487]. The apportionment may be based on the present use[488]. The arbitrator shall base his award on findings made by him as to areas used for milk production in the five years preceding the change of occupation[489].

"Areas used for milk production" were not defined in the initial regulations. However, the Queen's Bench Division of the High Court[490] de-

482 Gregory, M.; Sydenham, A., Essential Law for Landowners & Farmers, p. 116

483 MAFF, Discussion paper on Quota Mobility, published in: House of Commons, Session 1984-1985, Second Report of the Agriculture Committee, Annex VII, London 1985, p. xviii

484 DPQR 1984 (S.I. 1984/1047), Sch 2, para 19; DPQR 1991 (S.I. 1991/2232), reg 11

485 DPQR 1984 (S.I. 1984/1047), Sch 2, para 18, para 19; DPQR 1991 (S.I. 1991/2232), reg 8, reg 14, Sch 4; the DPQR 1984 envisaged that if an agreement is not reached and if parties do not refer the matter to an arbitrator, the reference quantities may be apportioned according to two automatic Formulae. In particular, where a holding comprises a dairy unit, the quota is allocated to the part of the holding which contains the dairy unit; DPQR 1984 (S.I. 1984/1047), Sch 2, para 19

486 Gregory, M.; Sydenham, A., Essential Law for Landowners & Farmers, p. 118

487 DPQR 1984 (S.I. 1984/1047), Sch 2, para 19; DPQR 1991 (S.I. 1991/2232), reg 11; MAFF, Discussion paper on Quota Mobility, ibid, p. xix

488 Watt Muir, J., Agricultural Holdings, p. 240

489 DPQR 1984 (S.I. 1984/1047), Sch 2, para 6; DPQR 1991 (S.I. 1991/2232) Sch 4, para 3

490 Pucknowle Farms Ltd v Kane (1985) 3 ALL ER, p. 79O

fined the term by giving it a broad interpretation[491]. The following areas are, according to this definition, included[492]: buildings and yards of a dairy unit; land used for dairy or dual purpose animals if bred for the herd and not resale; land used for dry cows between lactations, land used for heifers if they are necessary for continuance of the herd; and also land used to produce forage. Apart from the interpretation of the term "areas used for milk production", this judgement is important in that it also confirms the principle of a proportional division of milk quotas according to the areas used for milk production[493]. Reference quantities must be apportioned on an acre to acre basis[494].

2. Transfer of reference quantities to the national reserve or retained by transferor

The English legislator did not envisage any provision according to which reference quantities are transferred to the national reserve.

No maximum amount of reference quantities per hectare above which reference quantities are retained by the transferor has been fixed by the Regulations. Ministry guidance, however, indicates that the Agricultural Department will inquire into transfers of more than 20,000 litres per hectare[495].

Until 1989, however, reference quantities were retained by the transferor if changes of occupation of parts of a holding which were less than one quarter of the area of the remainder of the holding and also no larger than 5 hectares occurred[496]. In addition, either the interest of the occupier who comes into that part of the holding must be a tenancy of less than a tenancy (i.e. licences[497]), having a duration of less than one year. Or the transferor's interest must have been a tenancy or less than a ten-

491 Carter, D., (1987) 3 Agricultural Law Association Bulletin, p. 22; Hélin, F., (1989) No 171 Revue de droit rural, p. 140

492 Rodgers, C. P., Agricultural Law, p. 320; Pucknowle Farms Ltd v Kane (1985) 3 All ER, p. 794

493 Hélin, F., (1989) Revue de droit rural, No 171, p. 410; Gregory, M.; Sydenham, A., Essential Law for Landowners & Farmers, p. 119

494 Gregory, M.; Sydenham, A., Essential Law for Landowners & Farmers, p. 119

495 Rodgers, C. P., Agricultural Law, p. 318

496 so-called minor changes, DPQR 1984 (S.I. 1984/1047), reg 2 (1), Sch 3, para 19; DPQR 1986 (S.I. 1986/470), reg 8, abolished by DPQR 1989 (S.I. 1989/380), see explanatory note

497 Rodgers, C. P., Agricultural Law, p. 317, Footnote 19

ancy, having a duration of less than one year. This provision implements Art. 5 (3) of Commission Regulation 1371/84 and aims at ensuring the transfer of small amounts of land by short-term tenancies or grazing lets without quota[498] (as to the retention of reference quantities by the tenant see below).

G. Position of the tenant

Before examining whether difficult economic and social situations of the tenants were considered by incorporating Art. 7 (4) of Regulation 857/84, reference should be made to the tenancy structure. Finally, which rights other than the retention of reference quantities were given to the tenant as to reference quantities and how the legal nature of the quota is regarded under English law will be briefly inquired into.

As far as the proportion of rented land in the UK is concerned, 38 per cent of the total agricultural area was rented in the UK, with a proportion of 24 % of leased entire holdings in 1983[499]. For a long time, there has been a consensus on the British landlord and tenant system because it is alleged that the separation of farming and landowning functions relieves the tenant farmer of the problems associated with the management of land and associated fixed assets, resulting in a more efficient and prosperous farming sector[500]. The security of agricultural leases in the UK has therefore always been remarkably high in order to protect the tenants' interests[501]. Since 1875, various Agricultural Holdings Acts have been enacted in order to improve the position of tenants at Common Law.

498 MAFF, Discussion paper on Quota Mobility, published in: House of Commons, Session 1984-1985, Second Report of the Agriculture Committee, Annex VII, London 1985, p. xx. In practice, however, because of a further provision of the DPQR, only grazing licences were exempt from the transfer rules, see Pinfold, E., (1985) 82 LS Gaz, No 17, p. 1311

499 Hill, B., (1985) 19 Agricultural Administration, p. 191

500 Hill, B., (1985) 19 Agricultural Administration, p. 199

501 Hill, B., (1985) 19 Agricultural Administration, p. 206

I. Retention of reference quantities by the tenant

The UK did not implement Art. 7 (4) of Regulation 857/85. In order to understand its reasons, the security English tenants enjoy with respect to the termination of a tenancy must be examined.

The current Agricultural Holdings Act 1986[502] provides for mandatory rules of security if contracts have been concluded that are lettings of land or an agreement of letting of land, for a term of years or from year to year[503]. But a number of other licences or tenancies are, by statutory provision in the Agricultural Holdings Act 1986, converted into a protected tenancy under certain circumstances[504].

In order to terminate a tenancy protected under the Act, at least 12 months' notice to quit an agricultural holding or part of a holding[505], expiring at the end of a year of the tenancy, must be given[506]. This requirement applies not only to yearly tenancies but also to notices exercising options to break leases for fixed terms[507]. The notice to quit shall not have effect, if the tenant, not later than one month from the giving of the notice to quit, serves on the landlord a counter-notice and the Agricultural Land Tribunal[508] does not consent, on an application by the landlord, to the operation of the notice to quit[509]. Consent can only be granted if the landlord satisfies one of the six grounds of possession set out in the Act, and subject to the overriding requirement that the circumstances must be that a "fair and reasonable" landlord would demand possession[510]. Only in rare cases, can the landlord satisfy one of the grounds, for example prove that the management and productivity of the holding

502 Halsbury's Statutes of England, vol. 1, p. 732 et seq, repealing The Agricultural Holdings Act 1984 and The Agricultural Holdings (Notices to Quit) Act 1977, (Schedule 15 of the 1986 Act) The 1986 Act is a consolidating act, the tenant's right as to the termination was not altered by the 1986 Act, the range of tenancies being protected was even extended see Rodgers, C. P., Agricultural Law, p. 5. The situation outlined in this research is thus principally the one of tenants under the 1984 Act. Security of tenancy was introduced in 1947; Muir Watt, J., Agricultural Holdings, p. 86

503 Agricultural Holdings Act 1986, s 1 (5)

504 Agricultural Holdings Act 1986, s 2 and 3

505 for definition of holding see Agricultural Holdings Act 1986, s 1 (1), (4)

506 Agricultural Holdings Act 1986, s 26; Muir Watt, J., Agricultural Holdings, p. 81

507 Muir Watt, J., Agricultural Holdings, p. 81

508 as to function and composition see Stansfield, J. O., Halsbury's Laws of England, vol. 1 (2), p. 595

509 Agricultural Holdings Act 1986, s 26

510 Agricultural Holdings Act 1986, s 27; in the 1977 Act, only five provisions existed

can be improved[511]. There are, however, eight situations in which the tenant's right to serve a counter-notice is excluded, e.g. if the tenant has not paid the rent[512]. The rules on the notice to quit basically apply to parts of a holding, too[513].

As far as the rent is concerned, tenancies governed by the Agricultural Holdings Act 1986 are subject to three-yearly rent reviews by arbitration[514]. The Agricultural Holdings Act 1984 introduced a complex formula setting out in detail which factors arbitrators are to take into account, and which they are to disregard, in an attempt to tie the rent to the productive capacity of the holding rather than the free market rental value[515]. The possession of the milk quota by the sitting tenant is a benefit which should be considered in assessing the rent properly payable in case of rent arbitration[516].

With regard to the outlined secure position of the tenants as to the termination of a tenancy and a rent review granted that prevents a speculative increase in rent, no retention of reference quantities has consequently been foreseen on quitting. The rule according to which the transfer of parts of a holding below 5 ha are disregarded (see under F. III. 2.), gave protection to tenants, who at the time when the quota system was introduced, occupied small areas under grazing lets or tenancies, both for under 1 year[517]. These agreements are not protected by the Act.

511 Muir Watt, J., Agricultural Holdings, p. 90

512 Agricultural Holdings Act 1986, Sch 5, no change as to the 1984 situation, see Muir Watt, J., Agricultural Holdings, p. 108

513 Agricultural Holdings Act 1986, s 31, see Muir Watt, J., Agricultural Holdings, p. 101

514 Gregory, M.; Sydenham, A., Essential Law for Landowners & Farmers, p. 121; this period was also true under the Agricultural Holdings Act 1984 and rent rev`ew has been existing since 1948; Rodgers, C. P., Agricultural Tenancies, p. 65, 67

515 Rodgers, C. P., Agricultural Tenancies, p. 65; see Agricultural Holdings Act 1986, s 12, 13

516 Muir Watt, J., Agricultural Holdings, p. 227; see Agricultural Act 1986, s 15, Halsbury's Statutes of England, vol. 1, p. 873 et seq, providing that quotas which were transferred to the tenant by virtue of a transaction, the cost of which was borne wholly or partly by him, may be disregarded in this assessment

517 MAFF, Discussion paper on Quota Mobility, published in: House of Commons, Session 1984-1985, Second Report of the Agriculture Committee, Annex VII, London 1985, p. xx

II. Compensation rights as to reference quantities

1. Out-goer scheme

An out-going tenant has to ask for the landlord's consent when applying for compensation under an out-goer scheme[518]. According to the regulations incorporating the Community outgoers-scheme, the landlord's refusal is only irrelevant if the refusal is unreasonable[519].

2. Quota as improvement of the holding

a) The Agricultural Act 1986

In 1986, the legislator enacted provisions to grant compensation to tenants for milk quotas on termination of a tenancy, incorporated in the Agriculture Act 1986[520]. The Act filled a lacuna, because under the existing compensation rules, no compensation could be granted to the tenants since the possession of the milk quota is no improvement[521]. The unclear relationship between landlord and tenant over the quota was clarified[522]. Eligible tenants are persons who have milk quotas registered in their name in relation to land because they have been allocated quotas or were in occupation of the land as tenant on April 2, 1984 and had the milk quota subsequently transferred to them[523]. Tenants who replace tenants to whom the quota was originally allocated will not be entitled to compensation[524]. The tenants are entitled whether or not they have been given notice to quit[525]. The amount of the tenant's compensation is intended to reflect the extent to which the tenant had, by efficient farming or the

518 de Salis, W., (1984) 36 Country Landowner, No 9, p. 12; Carter, D., (1986) 4 Agricultural Law Bulletin, p. 5

519 Milk (Community outgoers Scheme) (England and Wales) Regulations 1986 (S.I. 1986/1611), reg 9, as amenended by S.I. 1987/410 and S.I. 1987/909

520 Agricultural Act 1986, reg 13, Sch 1, Halsbury's Statutes of England, vol. 1, p. 873

521 Muir Watt, J., Agricultural Holdings, p. 226

522 Rayment, J., (1986) 4 Agricultural Law Bulletin, p. 25; Pinfold, E., (1986) 280 EG, p. 1212

523 Agricultural Act 1986, s 13, Sch 1, Halsbury's Statutes of England, vol. 1, p. 873; tenancies not protected under the Act are not included; see Gregory, M.; Sydenham, A., Essential Law for Landowners & Farmers, p. 121

524 as an exception, statutory succession, assignemts and sub-tenancies cases are entitled to a compensation

525 Pinfold, E., (1986) 280 EG, p. 1212

provision of fixed equipment, increased the amount of quota registered in respect to the agricultural holding[526].

b) Infringement of tenant's fundamental rights

Because the 1986 Act has no retroactive effect[527], tenants who quit the holding after 1984 and before 1986 were not entitled to apply for compensation. A tenant who left the farm in March 1985 claimed by judicial review that the Ministry should extend to tenants who quit their farms between 1984 and 1986 the same rights as were given by the 1986 Act. The tenant relied on the "Wachauf" case[528]. He was granted leave to apply for judicial review by the Court of Appeal[529]. So far, no judgement has been delivered on this point[530]. The NFU, however, expects a government regulation to fill the lacuna[531].

This group of tenants who were in occupation of a holding when reference quantities were allocated are neither given the possibility of retaining reference quantities[532] or of applying for a compensation for the quota nor can they take part in an out-goer scheme without the landlord's consent. They are deprived of the quotas which are the fruits of their labour and their investments[533] and hence their right to property granted by the Community legal order[534] may be infringed[535]. Though there is an agreement that the quota is a licence, the quota can also be regarded as a property right, in particular when considering the possibility of leas-

526 Densham, H. A. C.; Scammell, W. S., Scammell and Densham's Law of Agricultural Holdings, p. 318
the tenant's share is calculated by fixing the so-called "standard quota" and calculating the "tenant's fraction" and the value of the quotas purchased by the tenant ("transferred quota"), see Gregory, M.; Sydenham, A., Essential Law for Landowners & Farmers, p. 123

527 see Purchas, L. J. in: R v. Minister of Agriculture, Fisheries and Food, ex parte Bostock, Court of Appeal (1991) 1 C.M.L.R., p. 691

528 see second chapter, F. I. 2.

529 R v. Minister of Agriculture, Fisheries and Food, ex parte Bostock, Court of Appeal (1991) 1 C.M.L.R. 687, on appeal from the Queen's Bench Division (1991) 1 C.M.L.R., p. 681

530 as to January 1992

531 Interview with J. Cleater, NFU, 23rd of January 1992

532 except when areas below 5 ha are restituted that have been leased under short-term tenancies agreements; see under F. III. 2.

533 however, they are granted compensation for investments like stables etc

534 Case 44/79 Hauer v Land Rheinland-Pfalz [1979] E.C.R., p. 3727 (3745)

535 see the "Wachauf" case

ing[536]. The Advocate General in "Wachauf" recognized that there might well be cases where the permanent loss to the tenant of quota could be viewed expropriatory[537]. Still, it is not clear to whom the quota belongs. But the tenant does at least deserve a share of the quota because the landlord's contribution, the capital, should be weighed with that of the producer, namely his labour[538].

Since the tenants' exercise of the quota is not only restricted but he is deprived of his property right[539], the question arises whether the deprivation constitutes, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights[540]. The deprivation of the property right of these tenants is not in the interest of the Community, because it does not contribute to the stabilization of the milk market nor to the obeyance of the transfer rules. In this respect, the deprivation of his right to property is disproportionate.

In addition, the principle of non-discrimination enshrined in Art. 40 (3) of the EEC Treaty[541], might be infringed because the difference in treatment between tenants who before 1986 quit the farm and those who after 1986 left the holding is not ojectively justified.

In practice, the manifold difficulties that arose in the relationship between landlord and tenant in the UK resulted in the creation of other methods of agricultural occupations such as share-farming or partnership farming and tenancies not protected under the Agricultural Holdings Act 1986[542].

536 see Cardwell, (1992) C.M.L. Rev., p. 742; Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 10

537 Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft, [1989] E.C.R., p. 2609 (2631)

538 Nies, V., (1989) Recht der Landwirtschaft, p. 201, Nies, V., (1990) Agrarrecht, p. 226; VG Frankfurt, (1990) 2 C.M.L.R., p. 301 even attributes the whole of the property right to the tenant

539 for the difference between restriction and deprivation see Case 44/79 Hauer v Land Rheinland-Pfalz [1979] E.C.R., p. 3727 (3746)

540 see for the formula: Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft, [1989] E.C.R., p. 2609 (2639)

541 Case 201-202/85 Klensch v Secrétaire d'Etat à l'Agriculture et à la Viticulture [1986] E.C.R., p. 3477 (3507)

542 Sweeney, J., (1987) 28 Farmland Market, p. 11

III. Legal nature of the reference quantity

Most of the English lawyers regard the quota as a species of interest alien to English property and land law, thus the quota is a concept sui generis[543]. Though statutory rights of the tenants concerning the quota have been created, the legal nature has not been clarified by the statutory rules[544]. In particular, the question of the ownership of the quota is still unclear[545]. Because no owner can be identified scholars think that the quota is only a quasi-property right[546].

543 Pinfold, E., (1986) 280 EG, p. 1212; Pinfold, E., (1985) 82 LS Gaz, No 17, p. 1307; Rodgers, C. P., Agricultural Law, p. 320 et seq; Gregory, M.; Sydenham, A., Essential Law for Landowners & Farmers, p. 116; Muir Watt, J., Agricultural Holdings, p. 226

544 Pinfold, E., (1986) 280 EG, p. 1212; Pinfold, E., (1985) 82 LS Gaz, No 17, p. 1307

545 Pinfold, E., (1986) 280 EG, p. 1212 proposing that the quota has to belong to the producer who occupies the land

546 Rodgers, C. P., Agricultural Law, p. 321

Chapter IV

Implementation of the Milk quota regulations in French Law

A. Agriculture policy and quota policy

I. Agricultural policy

In France, agriculture enjoys a predominant economic importance. France has the highest amount of agricultural land in the Community (31,527,000 ha in 1984; Germany: 12,004,000 ha; UK: 18,690,000 ha[547]). In 1983, agricultural exports accounted for 18 % of all exports (UK: 7.6 %; Germany: 6.0 %)[548], important for the reduction of the negative foreign-trade account. In 1983, 8.1 % of the employed civilian population in France were employed in agriculture, in Germany the figure was 5.6 % and in the UK 2.7 %[549]. The share of agriculture of the Gross National Product in 1983 was 4.0 % in France, 2.1 % in the UK, 2.2 % in Germany and 3.6 % in the whole Community[550].

Apart from the economic importance, agriculture enjoys a socio-political importance which is due to French concern about the problem of the depopulation (désertification) of French rural areas[551]. The population density is the third lowest in the Community, after Greece and Ireland. In 1984, there were 100 inhabitants per km^2 in France, in the UK 232 and

547 Bundesministerium für Ernährung, Landwirtschaft und Forsten (ed.), Statistisches Jahrbuch über Ernährung, Landwirtschaft und Forsten 1985, p. 359

548 Commission of the European Communities, The Agricultural Situation in the Community, 1985 Report, p. 195

549 Commission of the European Communities, The Agricultural Situation in the Community, 1984 Report, p. 282

550 Bundesministerium für Ernährung, Landwirtschaft und Forsten (ed.), Statistisches Jahrbuch über Ernährung, Landwirtschaft und Forsten 1985, p. 360

551 Treiber, W., Frankreich, in: Priebe, H.; Scheper, W.; von Urff, W. (eds.), Agrarpolitik in der EG, p. 53; Lorvellec, L., Droit rural, p. 251

in Germany 245[552]. Agricultural policy is thus closely linked to regional policy.

The main features of French agricultural policy are both the increase of productivity and exports[553] and promotion of young farmers and farmers in disfavoured areas[554].

II. Quota policy

The French dairy industry is rather divided with efficient production structures in the West of France (Grande-Ouest) and inefficient ones in the East of France[555]. The West of France (comprising "Bretagne", "Pays-de-Loire" and "Normandie") has, since 1978, greatly increased its deliveries and an intensive dairy production can now be recognized[556]. In 1990, 20.56 % of the milk produced in France was produced in "Bretagne" and 10.82 % in "Basse-Normandie"[557]. In 1983, the average yield per cow in "Bretagne" was 4,270 l per annum and in France, 3,800 l per annum[558]. As far as the number of purchasers as defined by the levy system is concerned, in 1985, there have been 1,322 purchasers (dairies) in France, 489 purchasers (dairies) in Germany and 5 purchasers (Milk Marketing Boards, see third chapter) in the UK[559]. In 1982, the size of the French (1,528 dairies in 1982) and German dairies (562 dairies in 1982) varied from over 5,000 litres to over 3 million litres of milk collected. In 1982, most of the French dairies (1,136) col-

552 Bundesministerium für Ernährung, Landwirtschaft und Forsten (ed.), Statistisches Jahrbuch über Ernährung, Landwirtschaft und Forsten 1985, p. 359

553 enshrined in several versions of the "loi d'orientation", Kroll, J. C., Politique agricole et relations internationales, p. 36 et seq, p. 217; Lorvellec, L., Droit rural, p. 250

554 Lorvellec, L., Droit rural, p. 250 et seq

555 Hairy, D.; Perraud, D., Crise et transformations de la politique laitière, in: Coulomb, P. et al (eds.), p. 85; Bonnafous, P., L'incidence des quotas, p. 33; Chambres d'agriculture (ed.): Quotas laitiers, Mars 1986, p. 4

556 Desbrosses, B.; Hairy, D.; Perraud, D.; Foulhouze, I.; (1988) Ecomomie rurale, No 187, p. 18

557 CNIEL, L'économie laitière en chiffres, édition 1991, p. 11, p. 23 et seq

558 Bonnafous, P., L'incidence des quotas, p. 33

559 Bundesministerium für Ernährung, Landwirtschaft und Forsten (ed.), Statistisches Jahrbuch über Ernährung, Landwirtschaft und Forsten 1987, p. 411; the British dairies which act as purchasers in regions that fall outside of the Board areas are not considered

lected less than 5,000 litres per annum and most of the German dairies (101) between 10,000 and 20,000 Mio. litres of milk[560].

The French dairy industry was in the process of growth when the super-levy system was introduced[561]. The goal of the French milk producers and industry has always been to catch up with the degree of production sufficiency in Northern Europe[562]. Thus, the proposition to introduce reference quantities came as a shock for many producers. The French government refused any quantitive restrictions and supported a progressive co-responsibility levy. Quantitive restrictions would have a negative effect on the French goal of increasing production[563]. The producers' organizations expressed their fierce opposition through many publicity effective demonstrations[564]. Because any increase of production was restricted by the pending levy for all Member States, the French tried to use this "frozen situation" in order to restructure their dairy industry[565]. This policy, financed by public funds[566], was supposed to be double-track in that it firstly envisaged the encouragement of producers with less efficient production structures to give up milk production. These small producers are held responsible for the structural setback of the French dairy industry seen as a whole[567]. Secondly, those quantities released were supposed to be allocated to prior producers[568], among them young farmers. Quotas were thus the opportunity to speed up the concentration of the industry[569]. Though conflicts of interest prevail

560 Bundesministerium für Ernährung, Landwirtschaft und Forsten (ed.), Statistisches Jahrbuch über Ernährung, Landwirtschaft und Forsten 1985, p. 389

561 Gadbin, D., (1985) Revue de droit rural, No 138, p. 509

562 Cordonnier, P., (1990) Purpan, No 155, p. 121; Burrel, A., (1988) Cahiers d'économie et sociologie rurales, No. 7, p. 95

563 Treiber, W., Frankreich, in: Priebe, H.; Scheper, W.; von Urff, W. (eds.), Agrarpolitik in der EG, p. 59; Hairy, D.; Perraud, D., Crise et transformations de la politique laitière, in: Coulomb, P. et al (eds.), p. 86

564 Agra-Europe 18/84, Länderberichte, p. 1 et seq; Agra-Europe 14/84, Kurzmeldungen, p. 3 et seq; The ONILAIT director was even kidnapped; see Agra-Europe 23/84, Länderberichte, p. 32 et seq

565 Hairy, D.; Perraud, D., Crise et transformations de la politique laitière, in: Coulomb, P. et al (eds.), p. 87

566 ONILAIT, Quotas laitiers, un bilan, p. 4; Hairy, D.; Prost, M., Milk Quotas in France; in: Burrel, A., Milk Quotas in the European Community, p. 7

567 Hairy, D.; Perraud, D., Crise et transformations de la politique laitière, in: Coulomb, P. et al (eds.), p. 89

568 ONILAIT, Quotas laitiers, un bilan, p. 4

569 Hairy, D.; Prost, M., Milk Quotas in France, in: Burrel, A. (ed.), Milk Quotas in the European Community, p. 8

within the producers' organization between the West of France and the East of France, the FNPL (Fédération Nationale des Producteurs de Lait) has succeeded in maintaining the "acquis paysage"[570].

B. Legal acts incorporating the milk quota Regulations into French law[571]

The Prime Minister enacted the "décret No. 84-661" of 17 July 1984[572] in order to incorporate the EEC milk quota Regulations into French law[573]. Several "arrêtés" were passed later[574]. "Décrets" and "arrêtés" are regulations[575]. "Décrets" are enacted by the President or the Prime Minister, whereas "arrêtés" are passed by one Minister of the government, a "préfet" or the "maire"[576]. Regulations may be autonomously enacted without a delegated legislation on the basis of Art. 37 of the French constitution or may be passed in order to execute a "loi" according to Art. 21 of the French constitution[577]. EEC Regulations are incorporated usually as "règlements" by the government, because the government is regarded as executing a "loi" on the basis of Art. 21 of the French constitution when incorporating Community Regulations[578].

The "décret No. 91-157" of 11 February 1991 revoked the original "décret"[579]. The "arrêtés" usually provide rules on how to determine the

570 With the Western French producers demanding a greater flexibility of the regulations to expand their production and to profit from weak producers giving up. Interview with FNPL and FNSEA officials in Paris in February 1992

571 direct sales are not treated

572 J. O. of 21. 7. 1984, p. 2373; a "circulaire" of 23. 5. 1984 was elaborated by the Agricultural Ministry which fixed the new regulations, see Bonneau, J.-R. (1984) (2^{e}sem.) Gazette du Palais, doctrine, p. 405

573 sources of law are: The constitution, laws ("lois"), regulations ("réglements" and "arrêtés"), and custumory law ("coutume"); see Constantinesco, V.; Hübner, U., Einführung in das französische Recht, p. 5 et seq

574 latest "arrêté" as to January 1992: "arrêté" of 31. 12. 1991, J. O. of 9. 1. 1992, p. 436

575 Rivero, J., Droit administratif, p. 89, Art. 52 of the French constitution

576 Rivero, J., Droit administratif, p. 89

577 Art. 21 of the French constitution

578 Constantinides-Mégret, C., La politique agricole commune en question, p. 51; Isaac, G., Droit communautaire en général, p. 191

579 J. O. of 13. 2. 1991, p. 2199

reference quantities for the purchasers and on the administration of the reference quantities in each twelve-month period[580].

C. Institutions charged with the application of the milk quota Regulations

The Ministry of Agriculture, ONILAIT (Office national interprofessionnel du lait et des produits laitiers), the dairies, the "Commissions mixtes départementales" and the "préfet" have been conferred the administration of the super-levy system[581].

France is a centralized state[582]. For administrative purposes, it is divided up into regions and "départements"[583]. The state administration is either carried out by territorial corporations under public law such as the local governments (collectivités locales), the "départements" and the regions[584]. Moreover, so-called "établissements publics" exist. These are non-territorial corporations of public law that are charged with special administration and are conferred a certain amount of financial and administrative autonomy[585].

I. Ministry of Agriculture and "préfet"

The general representatives of the Ministry of Agriculture in the "départements" or the regions are the "préfets"[586]. They are responsible for

580 ONILAIT, Quotas laitiers, un bilan, p. 9

581 Two more administrative consultative resp arbitration bodies, the "commission de conciliation des litiges" (Art. 16 of the "décret No. 84-661") and "les commissions régionales interprofessionnelles" (Art. 10 of the "décret No. 84-661") have been set up; in addition, CNIEL (Centre national interprofessionnel de l'économie laitière, a private organization) can be consulted by the "préfet", see Art. 7 of the "arrêté" of 10. 7. 1987, J. O. of 7. 8. 1984, p. 8923

582 as opposed to federal state; Rivero, J., Droit adminstratif, p. 429

583 Rivero, J., Droit administratif, p. 420 et seq

584 Regions were formed in 1960 mainly for implementing structural policy (Aménagement du territoire), Rivero, J., Droit administratif, p. 424

585 Rivero, J., Droit administratif, p. 594

586 The "préfet" was given the title "Commissaire de la République" by a "décret" of 11. 5. 1982 and given his traditional name back by a "décret" of 29. 2. 1988, see Rivero, J., Droit adminstratif, p. 428

general agricultural administration[587]. Moreover, they have to direct and co-ordinate the "Directions départementales de l'Agriculture et de la Forêt" (D.D.A.F.) which deliver the so-called "services extérieures" of the Ministry of Agriculture[588]. "Services extérieures" are mostly of a technical nature, but also concern the agricultural policy in general[589].

II. ONILAIT

Among the "établissements publics" that are charged with agricultural subject matters are those which are conferred the task of administering the organisation of the production and agricultural markets, namely the common organizations of the markets. These are called public bodies of market intervention[590].

In the 1980s, five public multi-professional bodies for the purpose of market intervention were created by way of "décret"[591]; among them was ONILAIT[592]. The legal nature of ONILAIT is as an industrial and commercial public body (établissement public industriel et commerciale (EPIC))[593]. As a multi-professional organization, it is administered by a council that is composed of dairy producers, representatives of the dairy industry and traders, representatives of the employers, the consumers and the public authorities[594]. ONILAIT has to implement the common agricultural policy, especially the intervention measures in the markets, and also to organize and govern the milk marketing chain[595]. The reason for setting up such bodies was to strengthen the state's role in the marketing

587 functions of the préfet in general; see Bottin administratif 1992, p. 1018

588 Lorvellec, L., Droit rural, p. 319, there are also "Directions régionales de l'agriculture et de la forêt"

589 Lorvellec, L., Droit rural, p. 319

590 Organismes publics d'intervention sur les marchés, Jegouzo, Y., Juris-Classeur administratif, vol. 4, Fasc. 358, p. 23

591 The "Loi No. 82-847" of 6. 10. 1982, J. O. of 7. 10. 1982, p. 2979 envisaged the creation of interprofessional offices; see Lorvellec, L., Droit rural, p. 470

592 see "décret No. 83-247" of 18. 3. 1983, J. O. of 29. 3. 1983 , p. 965

593 the EPIC belong to the group of "établissements publics", Rivero, J., Droit administratif, p. 607 et seq; Jegouzo, Y., Juris-Classeur administratif, vol. 4, Fasc. 358, p. 24; Lorvellec, L., Droit rural, p. 470

594 see "décret No. 83-247" of 18. 3. 1983, J. O. of 29. 3. 1983, p. 965

595 see "décret No. 83-247" of 18. 3. 1983, J. O. of 29. 3. 1983, p. 965; Jegouzo, Y., ibid, p. 24

chain and to overcome deficiencies of private multi-professional organizations[596]. ONILAIT is supervised by the government[597].

III. Commissions mixtes départementales

The "commissions mixtes départementales" were set up by a regulation in 1983[598]. They are presided over by the "préfet" of each "département"[599] and composed of civil servants and other representatives of the various bodies of the agricultural administration, persons competent in agricultural economics and representatives of the various agricultural professional organisations[600]. The "commission" is charged with structural policy, in particular it has to give its opinion on development plans to the approving "préfets"[601]. For the purpose of the administration the milk quota regulation, the "commission" is enlarged by representatives of the dairy cooperatives and the dairy industry[602]. A special department (section laitière) within the commission, consisting of State representatives, representatives of the dairy industry and the producers, was created later[603].

596 Hairy, D.; Perraud, D.; Crise et transformations de la polititque laitière, in: Coulomb, P. et al (eds.), p. 85; Lorvellec, L., Droit rural, p. 470 et seq

597 "sous tutelle" see Cheverry, P.; Bigot, J., Juris-Classeur rural, vol. 1, Fasc. 1, p. 6

598 "Décret No. 83-442" of 1. 6. 1983, J. O. of 3. 6. 1983, p. 1670

599 Dictionnaire Permanent Entreprise Agricole, Table analythique, Quotas laitiers (régime juridique), p. 792

600 Art. 26 of the "décret No. 83-442" of 1. 6. 1983, J. O. of 3. 6. 1983, p. 1670

601 "Décret No. 83-442" of 1. 6. 1983, J. O. of 3. 6. 1983, p. 1670. "Décret No. 85-1144" of 30. 10. 1985, J. O. of 1. 11. 1985, implementing Council Regulation 797/85; see Lorvellec, L., Droit rural, p. 259

602 "Décret No. 84-1017" of 19. 11. 1984, J. O. of 20. 11. 1984, p. 3572

603 Art. 6 of the "arrêté" of 10. 7. 1987, J. O. of 7. 8. 1987, p. 8922; Art. 22, 23 of the "décret No. 91-157", J. O. of 13. 2. 1991, p. 173

IV. Dairies

The French dairies have also been attributed administrative tasks. No public power, however, has been conferred on the dairies for the performance of these tasks[604].

D. Observance of the national guaranteed quantity when allocating reference quantities[605]

France did not exceed its national guaranteed quantity when allocating reference quantities[606]. Under which legal scheme this was possible will be shown.

I. Allocation of reference quantities to purchasers and producers

France implemented Formula B. The French national guaranteed quantity is divided up yearly by ONILAIT between the purchasers of milk (the dairies)[607]. The initial basis for the calculation of the purchasers' quantities was the sum of 1983 deliveries to dairies, deducted by a certain percentage[608]. In the first-twelve month period the deductive percentage of the purchasers' quotas envisaged in the initial "décret" had to be corrected from 2 % to 2.8 % in order not to exceed the national guaranteed quantity when allocating reference quantities[609]. The dairies allocate the reference quantities to the producers yearly on the basis of their deliveries in 1983 deducted by a certain percentage[610]. In practice,

604 Zimmermann, F., (1990) Revue de droit rural, No 182, p. 224; Conseil d'Etat, Welter, Rec. de Conseil d'Etat 1988, p. 83, confirmed by Conseil d'Etat, Gilet, (1991) Revue de droit rural, No 189, p. 43

605 only deliveries to dairies are treated

606 see Court of Auditors, Special Report No 2/87, O. J. 1987, C 266/11

607 Art. 1 of the "décret No. 84-661" of 17. 7. 1984, J. O. of 21. 7. 1984, p. 2373

608 Art. 17 of the "décret No. 84-661"; for mountain areas see Art. 1 of the "arrêté" of 22. 11. 1984, J. O. of 29. 11. 1984, p. 366

609 Prost, M., (1986) Economie rurale, No 172, p. 23; Bonnafous, P., L'incidence des quotas, p. 27

610 Art. 1 of the "décret No. 84-661"; Art. 3 of the "arrêté" of 22. 11. 1984, J. O. of 29. 11. 1984, p. 3660

the reference quantities for the producers are determined by way of negotiation between ONILAIT and the purchasers[611].

II. Allocation of reference quantities to producers in special situations

In France, all provisions for producers in special situations envisaged by the European legislator have been taken into account. The categories of the producers were constantly enlarged during the various campaigns and they varied in the yearly "arrêtés". In particular, young farmers[612] and farmers who undertook development plans were considered to a high degree[613].

III. Sources from which additional and specific reference quantities are allocated

Producers in special situations receive reference quantities (quantités supplémentaires) both from out-goer schemes and the national reserve.

1. Out-goer schemes

Purchasers are allocated reference quantities yearly by ONILAIT, including 90 %[614] of the quantities released by out-going milk producers. From these amounts, the purchasers allocate the reference quantities including additional and specific reference quantities to the producers. The Minister, in a yearly "arrêté", defines those producers who are entitled to receive supplementary reference quantities and determines the order in which these producers have to be considered[615].

611 Zimmermann, F., (1990) Revue de droit rural, No 182, p. 224

612 examples: Art. 5 of the "décret No. 84-661"; Art. 4 of the "arrêté" of 14. 10. 1988, J. O. of 25. 10. 1988, p. 13459; Art. 9 of the "arrêté" of 26. 4. 1989, J. O. of 30. 4. 1989, p. 5559

613 ONILAIT, Quotas laitiers, un bilan, p. 10

614 percentage varied between 80 and 90 % during the campaigns; 80 % in 1985/86 see "Arrêté" of 10. 7. 1985, J. O. of 14. 7. 1985, p. 7979

615 example: Art. 4 and 5 of the "arrêté" of 22. 11. 1984, J. O. of 29. 11. 1984, p. 3660; Art. 3 of the "arrêté" of 10. 7. 1985, J. O. of 14. 7. 1985, p. 7979; Art. 5, 6, 7, 8, 9 of the "arrêté" of 2. 5. 1990, J. O. of 7. 6. 1990, p. 6675

2. National reserve

Producers in special situations are, moreover, allocated reference quantities from the national reserve. First of all, 10 % of the quantities released by out-goer schemes were supposed to feed the national reserve administered by ONILAIT[616]. In addition, all quantities that are released by subtracting quotas from the transferee of reference quantities are added to the national reserve. They are re-allocated by the "préfet" after consultation with the "section laitière de la commission mixte départementale[617]". The re-allocation of these reference quantities, however, has to be carried out according to the "arrêté"[618]. In practice, many reference quantities are re-allocated to the producers who released them[619]. This demonstrates the powerful role which the administration was given in the restructuring process.

According to a provision of the "décret No. 84-661", producers in special situations, including producers with a development plan, are only re-allocated reference quantities up to 200,000 litres or 97 % of the delivery objective of the plan[620]. This ceiling was widely criticized because it punishes larger producers[621]. However, the amount of reference quantities for producers in special situations is limited[622]. The "Cour d'appel de Rennes" referred to the ECJ[623] asking for compliance with Community rules. According to the ECJ, the establishment of a ceiling does not contravene the implemented Art. 3 of Regulation 857/84 because it is an objective criterium in order to determine the specific reference quantity, and the promotion of small producers is at the discretion of the Member State[624]. Moreover, the ECJ ruled on whether the French regu-

616 Art. 2 of the "arrêté" of 22. 11. 1984, J. O. of 29. 11. 1984, p. 3660; percentage varied, see above

617 "circulaire" of 14. 8. 1987, Art. VI, published in : Répertoire du Notariat Defrenois, 3O Novembre 1987, 1e partie, p. 14O9; Art. 14 of the "arrêté" of 26. 4. 1989, J. O. of 30. 4. 1989, p. 5557, Art. 5 of the "décret No. 84-661"

618 Art. 14 of the "arrêté" of 26. 4. 1989, J. O. of 30. 4. 1989, p. 5557

619 Lorvellec, L., (1987) Revue de droit rural, No 157, p. 416; Rameau, (1990) Revue de droit rural, No 184, p. 312

620 "Arrêté" of 14. 10. 1986, J. O. of 25. 10. 1986, p. 13459; see also "arrêté" of 29. 3. 1991, J. O. of 7. 4. 1991, p. 4885

621 Prost, M., (1986) Economie rurale, No 172, p. 22

622 Prost, M., (1986) Economie rurale, No 172, p. 22

623 Case 196/88 to 198/88 Cornée et al v Coopérative agricole laitière de Loudéac "Copall" [1989] E.C.R., p. 2309

624 Case 196/88 to 198/88 Cornée et al v Coopérative agricole laitière de Loudéac "Copall" [1989] E.C.R., p. 2309 (2345 et seq)

lation that foresees that the purchasers re-allocate reference quantities to their affiliated producers according to an order of priority discriminates producers of one dairy against those of another. The ECJ pointed out that this regulation does not infringe the principle of the prohibition of discrimination provided that if necessary such re-allocations are adjusted subsequently in order to neutralize any differences in treatment between producers affiliated to different purchasers[625].

To sum up, the French "producteurs prioritaires" had no legal title to receive supplementary reference quantities, but the allocation depended on the quantities available in each campaign[626].

3. Regionalisation of the restructuring process

The purchasers re-allocated the "quantités supplémentaires" in their own region. The result of these regional re-allocations was that in certain regions (in particular in the East of France and South-West of France) unused quotas ("quotas morts"[627]) were retained by the purchasers. The competences of the purchasers that have been widely criticized[628] have been limited, because, since 1987/88, the national out-goer schemes have been supplemented by regional and departemental schemes (so-called "conventions")[629]. The re-allocation of these quantities is restricted to the region where they are released and is carried out by the purchasers under supervision of the "Commission mixte départementale" presided over by the "préfet"[630].

Because the amount of reference quantities available for re-allocation in the regions increased steadily, the restructuring process was regionalised[631]. Restructuring measures carried out nation-wide with the help of the national reserve were of minor importance[632]. The result of the

625 Case 196/88 to 198/88, ibid, p. 2309 (2347)

626 see Art. 4 of the "decret No. 84-661"

627 Hairy, D.; Prost, M., Milk Quotas in France, in: Burrel, A. (ed.), Milk Quotas in the European Community, p. 8; see Derouille, J.-P., (1987) Agriculture Magazine, No. 15, February, p. 46

628 Charles-Le Bihan, D., (1985) Revue de droit rural, No 138, p. 516

629 see Albert, J.-L., (1989) Revue de droit rural, No 173, p. 227

630 ONILAIT, Quotas laitiers, un bilan, p. 11

631 Hairy, D.; Perraud, D., Crise et transformations de la politique laitière, in: Coulomb, P. et al (eds.), p. 93

632 Hairy, D.; Prost, M., Milk quotas in France, in: Burrel, A. (ed.), Milk Quotas in the European Community, p. 8

regionalisation was that the milk production structure in France was frozen[633]. Hardly any movement of reference quantities to other "départements" took place. Thus, the expansion of the more efficient regions was slowed down and the decline of less efficient regions has been delayed[634]. Another disadvantage of the regionalisation was the unequal treatment of prior producers from different dairies and regions, because the quantities available for re-allocation differ from region to region[635].

E. Implementation of Formula B

The territory of France was divided up into two regions for the application of the milk quota regulation: mountain areas and the rest of the country[636]. France opted for the implementation of Formuala B[637] for the whole of the country. There were two main reasons for choosing Formula B: First of all, Formula B allows an equalization between over- and underdeliveries within the area of one purchaser, thus is more flexible because the levy amount paid is less than the full target price[638]. The "shock" of the introduction of milk quotas could consequently be softened in France (which was in the process of gently restructuring its dairy industry[639]). Secondly, administration under Formula B seemed to be easier because there are fewer dairies than producers[640].

633 ONILAIT, Quotas laitiers, un bilan, p. 5

634 Hairy, D.; Perraud, D., Crise et transformations de la politique laitière, in: Coulomb, P. et al (eds.), p. 93

635 Prost, M., (1986) Economie rurale, No 172, p. 24

636 ONILAIT, Quotas laitiers, un bilan, p. 10
For the mountain areas, a specific quota policy has been pursued: for example additional reference quantities of the national reserve were affected or a lower percentage of reduction of individual reference quantities was applied to them; see ONILAIT, Quotas laitiers, un bilan, p. 10 et seq, Prost, M. (1986) Economie rurale, No 172, p. 22

637 Art. 2 of the "décret No. 84-661"; Prost, M., (1986) Economie rurale, No 172, p. 23

638 Bonneau, J.-R., (1984) (2e sem.) Gazette du Palais, doctrine, p. 406

639 Gadbin, D., (1985) Revue de droit rural, No 138, p. 509

640 Hairy, D.; Perraud, D., Crise et transformations de la politique laitière, in: Coulomb, P. et al (eds.), p. 92

I. Diversity of milk production structure, equalization

The levy initially paid by producers in France was low because of the possibility of national and regional equalization and Formula B. In fact, in 1985/86, for example, no levy was paid, though many dairies in the West were in excess of their reference quantities[641]. The possibility of the regional and national equalization was introduced because in some areas of France a high degree of "quotas morts" existed at the end of the campaign[642]. The national and regional equalization is carried out by ONILAIT[643].

The disadvantage of implementing Formula B in France was that only producers of one dairy were treated equally. The reasons are both the diverse milk production and milk-collection structure. France has many small and dispersed dairies[644]. Because the equalization depends in the first place on the degree of over- and underdeliveries within one dairy, producers of one dairy have profited from equalization to strikingly different degrees than producers from other dairies[645]. The level of penalties varied significantly[646]. Moreover, some dairies favoured certain producers by obscure practices of calculating their levy[647].

From 1985/86 onwards, several efforts were undertaken to reform the calculation of the super-levy[648], taking the European reform on Formula B into account. The objective was to have every producer in excess of his reference quantity pay at least a certain percentage of the levy independently of the excess of the dairy and to compensate the inequalities between prior producers. Actually, certain producers are allocated provi-

641 Court of Auditors, Report No 2/87, O. J. 1987, C 266/19, Lefèvre, D., (1987) Agricultural Magazine, No 15, February, p. 45

642 see second chapter, F. I. 2.; Lefèvre, D., (1987) Agricultural Magazine, No 15, February, p. 45

643 Art. 2, 3 of the "arrêté" of 4. 7. 1986, J. O. of 23. 7. 1986, p. 9098

644 see under A.; Petit, M. et al, Agricultural Policy Formation in the European Community, p. 51

645 ONILAIT, Quotas laitiers, un bilan, p. 39; Lefèvre, D., (1987) Agricultural Magazine, No 15, February, p. 47

646 Hairy, D.; Prost, M., Milk Quotas in France, in: Burrel, A. (ed.), Milk Quotas in the European Community, p. 9

647 Hairy, D.; Prost, M., Milk Quotas in France, in: Burrel, A. (ed.), Milk Quotas in the European Community, p. 18

648 for a survey see ONILAIT, Quotas laitiers, un bilan, p. 12 et seq, p. 39 et seq; Hairy, D.; Prost, M., Milk Quotas in France, in: Burrel, A. (ed.), Milk Quotas in the European Community, p. 9

sional reference quantities by the purchasers during the twelve-month period, the sum of which is a percentage of the estimated amount of underdeliveries to their dairy[649]. Provisional reference quantities are, in the first place, allocated to "producteurs prioritaires", and secondly to all other producers[650]. If producers exceed the finalised reference quantity at the end of the year (including their own and provisional quota), however, they have to pay the full target price of the super-levy[651]. Offsetting is still possible under these reforms, but only to the extent that the amounts for which the producer pays levies might be different; the levy rate is, however, always the same percentage of the target price. Producers are treated more equally now. By making the producer more responsible for his own production, elements of Formula A have been introduced in France[652]. The levy, which is calculated by ONILAIT, must be paid by the purchasers to ONILAIT[653].

II. Administrative viability

As shown, ONILAIT is mainly charged with the administration of the super-levy system[654]. In addition to this central level of administration by ONILAIT, the various regional organizations, including the dairies, hold an important position in the re-allocation of reference quantities.

The dairies have to notify the producer's reference quantities including the "quantités supplémentaires" to the producers. The allocation of the reference quantities to the producers by the purchasers are according to a judgement of the "Conseil d'Etat", purely a matter of private contract

649 Art. 6 of the "décret No. 91-157" of 11. 2. 1991, J. O. of 13. 2. 1991, p. 2199, Art. 13 of the "arrêté" of 29. 3. 1991, J. O. of 7. 4. 1991, p. 4884
see also as examples: Art. 11 of the "arrêté" of 11. 4. 1987, J. O. of 14. 4. 1987, p. 4246; Art. 4 of the "arrêté" of 10. 7. 1987, J. O. of 7. 8. 1987, p. 8922; Art. 3 of the "arrêté" of 26. 4. 1989, J. O. of 30. 4. 1989, p. 5557

650 examples: Art. 14 of the "arrêté" of 29. 3. 1991, J. O. of 7. 4. 1991, p. 4884; Art. 17 of the "arrêté" of 26. 4. 1989, J. O. of 30. 4. 1989, p. 5557; Rameau, (1987) Revue de droit rural, No 184, p. 311

651 Art. 19 of the "arrêté" of 29. 3. 1991, J. O. of 7. 4. 1991, p. 4884, unused quantities at the end of the campaign are foremost allocated to prior producers

652 see Hairy, D.; Prost, M. Milk Quotas in France, in: Burrel, A. (ed.), Milk Quotas in the European Community, p. 11; Rameau, (1987) Revue de droit rural, No 184, p. 311

653 Art. 1 of the "décret No. 84-661", J. O. of 21. 7. 1984, p. 2373

654 see Art. 1 of the "décret No. 84-661"

between the dairies and the producers, thus only pursueable in civil courts[655]. The position of the dairies remains ambiguous because they are delegated, being private enterprises, some implicit powers by ONILAIT[656].

There has been misuse of the scheme by dairies in that they favoured certain producers[657] and tried in particular to attract producers with a huge quantity of reference quantities from other dairies in order to exhaust their production capacities[658]. In detail, dairies are alleged to have notified reference quantities to producers in excess of their purchaser's quota, to have infringed the rules when they allocated additional reference quantities or provisional reference quantities and not to have notified the producers' reference quantities to ONILAIT[659]. Moreover, they have not prevented leasing arrangements from taking place[660]. Finally, because the competitive situation among dairies and producers increased, the state decided to subject the dairies' administration to stricter control[661]. The powers of ONILAIT were enlarged in 1990 by authorising them to collect administrative penalties from the dairies if the dairies fail to correctly administer the quota system[662]. In 1990, ONILAIT controlled the dairies to the extent that 72 % of national milk deliveries were checked by the office[663].

655 Conseil d'Etat, Welter, Rec. de Conseil d'Etat 1988, p. 83, confirmed by Conseil d'Etat, Gilet, (1991) Revue de droit rural, No 189, p. 43

656 Zimmermann, F., (1990) Revue de droit rural 1990, No 182, p. 224

657 Tétu, G., (1990) La propriété agricole, No 174, p. 6

658 Derouille, J.-P., (1987) Agricultural Magazine, No 15, February, p. 46 et seq showing that in particular in less efficient regions with "quotas morts", dairies were lacking milk

659 see ONILAIT, Rapport annuel 1990, p. 72; Fédération Nationale des Producteurs de Lait, 47e Assemblée générale 1991, p. 35

660 see ONILAIT, Rapport annuel 1990, p. 72; Fédération Nationale des Producteurs de Lait, 47e Assemblée générale 1991, p. 35

661 Fédération Nationale des Producteurs de Lait, 47e Assemblée générale 1991, p. 35

662 Art. 52 of the "Loi No. 90-85" of 23. 1. 1990, J. O. 25. 1. 1990, p. 998, applying rules in "décret No. 91-157" of 11. 2. 1991, J. O. of 13. 2. 1991, p. 2199

663 ONILAIT, Rapport annuel 1990, p. 72

F. Transfer of reference quantities

I. No visible quota markets

The original "décret" that implemented the EEC milk quota Regulations into French law did not contain any provisions for the transfer of milk quotas. Only a "circulaire"[664] was enacted in 1986 to prevent sham transactions. Black markets had developed and quotas were, especially in the West of France, transferred without any land[665].

In 1987, the French Agricultural Minister finally passed a regulation concerning the transfer of milk quotas in France[666]. This "décret" has been interpreted and even modified by a number of "circulaires". The most important ones are the "circulaire" of 14 August 1987[667] and the "circulaire" of 2O January 1988[668]. There were doubts as to whether the instrument of a "circulaire" was used legally and correctly in France because it modified regulations, although its function in French administrative law is limited to explaining "décrets" and to this purpose, "circulaires" are adressed to the administration[669].

The French rules on the transfer of reference quantities established a very rigid regime[670]. Notably, leasing is not allowed. The quota has not developed into a tradeable asset in France; at least, no official publications indicate that a value has been attached to the quota itself[671]. However, black markets in which quotas are not transferred according to the rules but are leased out, exist[672]. A "circulaire" of 14 November 1991 tried to

664 "Circulaire du 7 octobre 1986", see Lorvellec, L., (1987) Revue de droit rural, No 150, p. 55

665 Lorvellec, L., (1987) Revue de droit rural, No 150, p. 55

666 "Décret No. 87-6O8" of 31. 7. 1987, J. O. of 2. 8. 1987, p. 8727

667 published in : Répertoire du Notariat Defrenois, 3O Novembre 1987, 1e partie, p. 14O9

668 Dictionnaire Permanent Entreprise Agricole, Table analythique, Quota laitiers (régime juridique), p. 786

669 Gilardeau, J.-M., Juris-Classeur rural, vol. 4, Fasc. C-3, p. 11, p. 14; Lorvellec, L., (1987) Revue de droit rural, No 157, p. 416; Peignot, B., (1991) Agriculteurs de France, No 57-58, p. 2O; Tribunal de Rennes, André, (1990) Revue de droit rural, No 182, p. 225

670 Lorvellec, L., (1987) Revue de droit rural, No 157, p. 416

671 apparently, however, the value of the land disposing of quotas increased, see Bénard, J.-D., (1989) Paysans, No 197, p. 35

672 see Peignot, B., (1990) Purpan, No 155, p. 116, According to Duluc, J.-C.; Marechal, C., (1987) Le Nouvel Agriculteur, 20 February, p. 21, the prices on the black market are 2-3 F/per litre. Leasing markets, especially, developed between

forbid all irregularities that occurred such as leasing out reference quantities[673].

In order to ascertain why the reference quantity has not become a visible tradeable asset, the transfer rules will be investigated.

II. Conditions for the transfer of reference quantities

1. Transactions of the holding or parts of it that entail the transfer of reference quantities under French law

According to Art. 1 and Art. 3 of "décret No. 87-608", the transactions entailing the transfer of reference quantities are sale, donation, lease and inheritance of land. All other transactions that have a similar effect, whether they include the transfer of a right of property (propriété) or of use (jouissance), also entail the transfer of reference quantities[674].

Under French law, a lease protected by the "code rural", would have to be concluded for seven years. Such a lease grants exclusive possession[675]. Other forms of letting agreements not protected under the "Code rural" would be e.g. a sale of grass (vente d'herbe). Such a sale, however, would not grant exclusive possession to the transferee and thus would not comply with the French quota rules and Community law[676]. Still, there are a few short-term lettings not protected under the "Code rural" that grant exclusive rights of possession[677].

The French legislator did not allow any temporary re-allocation of reference quantities without any land transaction taking place[678]. The reason was fear of any wild restructuring that might arise and thus endanger the state-controlled restructuring process.

neighbours at the end of the campaign, FNIL, (1990) Purpan, No 155, p. 112; Tétu, G., (1990) La propriété agricole, No 174, p. 7; Gouin, D.-M., (1986) Economie rurale, No 175, p. 32

673 (1991) Revue de droit rural, No 198, p. LXXXI

674 examples are: "la constitution d'usufruit", "le partage de la communauté", see Dictionnaire Permanent Entreprise Agricole, Table analythique, Quotas laitiers (régime juridique), p. 787

675 see Art. L. 411-5 Code rural for both holdings (Baux de fermage; Art. L. 411-1 Code rural) and parcels (Baux de parcells; Art. L. 411-3)

676 Gilardeau, J.-M., Juris-Classeur rural, vol. 4, Fasc. C-3, p. 12

677 Art. L. 411-3 Code rural; other exceptions see art. L. 411-2 Code rural; Hudault, J., Droit rural, p. 166 et seq

678 de Crisenoy, C., (1988) Cahiers d'économie et sociologie rurales, No 7, p. 158; Peignot, B., (1990) Purpan, No 155, p. 118

2. Formal requirements for the transfer of reference quantities

The transfer of milk quotas must be declared to the D.D.A.F., whose representative is the "préfet"[679]. The "préfet" then fixes the new amount of reference quantities and decides on which reference quantities are to be transferred to the national reserve. This decision has to be notified to ONILAIT and to the purchasers. The power of the "préfet" to fix the amounts of reference quantities that have to be transferred to the national reserve has been challenged in court because the "circulaire" in question was not a sufficient legal basis for his competence[680]. Since 1991, provisions in the "décret No. 91-157" expressly define his power[681]. The function of the "préfet" can be described as that of ensuring the application of the transfer rules[682].

III. Transfer of reference quantities as legal effect

1. Transfer of reference quantities to the transferee

The whole reference quantities of an undertaking are in accordance with the principie of attachment of quotas to land transferred when a whole undertaking is transferred to one beneficiary[683].

In the case of a partial transfer of a holding, the reference quantities are divided up among the producers according to the amount of reference quantities that are attached to the transferred surface[684]. No reference quantities are attached to certain surfaces which are defined by Art. 3 of the "décret"; these are forest, wasteland, ponds, fallow land and permanent cultures. The French legislator thus enacteed a clear and broad definition for the criteria that determine the areas used for milk production.

679 Art. V (a) of the "circulaire" of 14. 8. 1987, published in: Répertoire du Notariat Defrenois, 3O Novembre 1987, 1e partie, p. 14O9

680 Tribunal de Rennes, André, (1990) Revue de droit rural, No 182, p. 225

681 J. O. of 13. 2. 1991, p. 2199

682 Gilardeau, J.-M., Juris-Classeur rural, vol. 4, Fasc. C-3, p. 8, Zimmermann, F., (1990) Revue de droit rural, No 182, p. 224

683 Art. 1 of the "décret No. 87-6O8" of 31. 7. 1987, J. O. of 2. 8. 1987, p. 8727

684 Art. 3 of the "décret No. 87-6O8"

2. Transfer of reference quantities to the national reserve

The French legislator made thorough use of the possibilities of adding reference quantities in certain cases to the national reserve in order to pursue an active policy of restructuring[685].

If the transferee does not want to continue the milk production, the reference quantities are added to the national reserve[686]. This applies both to the partial transfer of land and to the transfer of an entire holding[687]. In this way, the French legislator tried to avoid the so-called "quotas morts"[688]. If the reference quantity of the beneficiary exceeds the amount of 200,000 litres after the transfer of reference quantities, 50 % of the exceeding amount is added to the national reserve[689]. This applies both to the transfer of one holding to another holding (called "réunion d'exploitations laitiers") and to the transfer of parts of a holding (called "démembrement"). Finally, if parts of a holding (up to 20 ha) are transferred, all reference quantities are released to the national reserve[690]. This relatively large mimimum surface of 20 ha and the ceiling of 200,000 litres slow down the transfer of land[691].

3. Reference quantities retained by the transferor

According to Art. 7 of the " décret No. 87-608", the out-going producer might retain reference quantities if land is transferred to authorities or because of public interest. In this case, he must intend to continue with milk production. As to the out-going tenant see under G.

IV. The flexibility of the rules

An examination of the history of milk quotas casts some doubt over the rigid transfer rules in spite of a certain success in the restructuring pol-

685 Lorvellec, L., (1987) Revue de droit rural, No 157, p. 415; Rameau, (1987) Revue de droit rural, No 184, p. 311

686 Art. 4 of the "décret No. 87-6O8"

687 de Crisenoy, C., (1988) Cahiers d'économie et sociologie rurales, No 7, p. 156

688 Lorvellec, L., (1987) Revue de droit rural, No 157, p. 411

689 Art. 2 and Art. 4 of the "décret No. 87-6O8", threshold of 200,000 litres fixed by "arrêté" of 14. 9. 1987, J. O. of 16. 9. 1987, p. 11469

690 Art. 3 of the "décret No. 87-6O8"

691 see Dictionnaire Permanent Entreprise Agricole, Table analythique, Quotas laitiers (régime juridique), p. 788; Rameau, (1990) Revue de droit rural, No 184, p. 312

icy[692]. The restructuring process was quite successful if we consider that, from 1984/85 to 1990/91, 4.4 million tonnes (17 % of the national guaranteed quantity[693]) of reference quantities were released by way of outgoer schemes[694]. Consequently, the average cow per farm and the average yield per cow increased and a number of small producers went out of production[695]. In particular, the number of dairies declined[696]. Yet in 1989, the average yield per cow and number of cows per farm was below the British average[697].

Increasing demand for individual reference quantities[698] and the continuing necessity of restructuring the dairy sector[699] led to a fierce debate over whether and how to allow any kind of quota market to fulfill these demands[700]. Moreover, the state is unwilling to finance future restructuring programs to the extent that it has before[701]. The necessity of allowing non prior producers to receive additional reference quantities is also recognized[702]. Organisations like the FNPL (Fédération Nationale des Producteurs de Lait) and the purchasers demand the authorization of leasing[703]. ONILAIT imagines a bourse of reference quantities, where both leasing and sale of quotas are controlled[704]. The Minister of Agriculture has pointed out that he refuses to authorize a quota market but that more flexibility of the regulation will be discussed[705]. He fears the rise of wild restructuring if a free market is allowed, in particular

692 Grynspan, A., (1990) Purpan, No 155, p. 1O7, see also Rép. min. Agriculture et Forêt, J. O. déb. Ass. nat., Q (Questions), 20. 3. 1989, p. 1358; Rép. min. Agriculture et Forêt, J. O. déb. Ass. nat., Q, 18. 9. 1989, p. 4158, published also in: (1989) Revue de droit rural, No 177, p. 463

693 ONILAIT, Quotas laitiers, un bilan, p. 10

694 Landry, S., (1991) Revue laitière française 1991, No 512, p. 14

695 for details, see ONILAIT, Quotas laitiers, un bilan, p. 28, 31

696 ONILAIT, Quotas laitiers, un bilan, p. 36

697 see third chapter, A.; Annex

698 see Peignot, B., (1990) Purpan, No 155, p. 115, 117

699 Cordonnier, P., (1990) Purpan, No 155, p. 121 points out that, for France, a higher output per farm per annum (200, 000 litres/farm, in 1989 only 100, 000 litres/farm) is necessary to gain optimum productivity factors

700 for a survey of the different opinions (Ministry of Agriculture, professional organizations and experts) see FNIL, (1990) Purpan, No 155, p. 111 et seq

701 see FNIL, (1990) Purpan, No 155, p. 111

702 FNIL, (1990) Purpan, No 155, p. 111

703 see Ortalo, M., (1990) Purpan, No 155, p. 11O; see FNIL, (1990) Purpan, No 155, p. 112

704 see Peignot, B., (1990) Purpan, No 155, p. 119

705 Rép. min. Agriculture et Forêt, J. O. déb. Ass. nat., Q, 5. 4. 1991, p. 746 et seq

endangering young farmers[706]. The system of state-controlled restructuring by out-goer schemes in France would be endangered in a market where competition between producers is the instrument of restructuring[707].

G. Position of the tenant

In France, the proportion of tenanted land was 50.8 % in 1983[708]. Strikingly, this proportion has hardly changed since 1890[709]. However, the proportion of leased land in regions with owner-occupier areas increased, whereas owner-occupation increased in former rented areas, mainly because of the reform of the landlord and tenant law, detrimental to landowners. The amount of mixed operations is increasing steadily at the expense of full tenants units or full owner occupations[710]. Since 1946, France has had a special law on landlord and tenant, the so-called "Statut du fermage et métayage". This law is relatively favourable to the tenants and has replaced the essentially liberal rules of the "Code civile"[711]. Powerful tenants' organizations were able to enforce this reform after the war in 1946[712].

I. Retention of reference quantities by the tenant

Generally speaking, the French tenant enjoys high security as to the termination of the tenancy[713]. Basically, the tenancy is supposed to last for nine years[714]. No security, however, is granted for tenancies if the

706 see FNIL, (1990) Purpan, No 155, p. 111; see also Rép. min. Agriculture et Forêt, J. O. déb. Ass. nat., Q, 20. 8. 1990, p. 3886

707 Cordonnier, P., (1990) Purpan, No 155, p. 121; Hairy, D.; Prost, M., Milk Quotas in France, in: Burrel, A. (ed.), Milk Quotas in the European Community, p. 17

708 Ministère de l'Agriculture, La structure des exploitations agricoles en 1987, Paris 1988, p. 16

709 Bergmann, D., (1985) 19 Agricultural Administration, p. 209

710 Bergmann, D., ibid, p. 209

711 Bergmann, D., ibid, p. 209

712 Bergmann, D., ibid, p. 209

713 Bergmann, D., ibid, p. 214

714 Art. L. 411-5 Code rural for both holdings and parcels

surface is less than a certain number of ha[715]. To circumvent the rules, sales of grass are often undertaken[716].

Under French law, the tenancy may be terminated by the dissolution (résiliation) of the contract and by refusal to renew the contract through delivery of a notice to quit.

The contract can be dissolved in a few limited cases e.g. because of faulty behaviour of the tenant or if the land may be used for urbanization[717]. Secondly, after nine years, the landlord may refuse, by way of a "congé", a renewal of the tenancy in some special situations such as a behaviour on the part of the tenant which contravenes the contract[718]. In particular, the renewal of the tenancy may be refused if the landlord himself or his relatives want to exploit the land[719] (so-called "droit de reprise"). Renewal for those parts of the tenanted land on which the landlord intends to construct a farmhouse may also be refused[720]. If the landlord does not refuse the renewal, the tenancy is automatically extended to another nine years[721]. Because for each "département", the "préfet" fixes the limits between which rents must remain, the tenant may even continue his lease under similar conditions and is not subject to unjustified rent increases[722]. Since 1975, when the rules were reformed[723], the size limits have been raised only very slowly[724].

To sum up, in only a few cases do tenants have no right to renew their tenancy under similar conditions. In most of these cases (urbanization and construction of farmhouse) the French legislator envisages that out-going tenants may keep reference quantities if they intend to continue milk production. (Art. 5 and 6 of the "décret No. 87-608") However, if the tenant has to restitute the holding due to a notice to quit by the landlord because

715 Art. L. 411-3 Code rural; other exceptions see Art. L. 411-2 Code rural; Hudault, J., Droit rural, p. 166 et seq

716 Bergmann, D., (1985) 19 Agricultural Administration, p. 214; Art. L. 411-1 Code rural tries to prevent the misuse of these forms, see Hudault, J., Droit rural, p. 141

717 Art. L. 411-30 to Art. L. 411-32 Code rural

718 Art. L. 411-53 Code rural

719 Art. L. 411-58 Code rural

720 Art. L. 411-57 Code rural

721 Art. L. 411-51 Code rural

722 Lorvellec, L., Droit rural, p. 105, Art. R. 411-1 Code rural

723 before 1975, rents were fixed on the 1939 basis, see Lorvellec, L., Droit rural, p. 105

724 Bergmann, D., (1985) 19 Agricultural Administration, p. 214

the latter wants to exploit the holding[725] (droit de reprise), the landlord has to agree in a written statement that the tenant preserves quotas[726]. No retention is foreseen if the tenancy is dissolved due to a fault of the tenant or because he is of retiring age[727]. However, in these cases the tenant is vouchsafed no protection.

II. Compensation rights as to reference quantity

1. Out-goer schemes

The participation of tenants in out-goer schemes in France caused many problems and a set of judgements have been delivered to deal with this[728].

According to French law, the landlord's consent is not required if the tenant applies for compensation under an out-goer scheme[729]. The reason is that, according to the "Code civil", the tenant is entitled to free management of the holding[730]. The authorities have to inform the landlord if the tenant wants to take part in out-goer schemes[731]. In addition, since 1987, the Landowners' Association (FNPA) has been able to enforce non-attribution of compensation to the tenant if the latter received a notice to quit ("congé"), if the tenancy is dissolved ("résilié") or if the tenant does not want to renew the tenancy[732].

Problems have arisen, as to whether the landlord can demand damages for the lost quota[733]. The "Tribunal paritaire d'Avesnes-sur-Helpe" held that the tenant was liable for the payment of damages because his applica-

725 droit de reprise, Art. L. 411-58 Code rural

726 see Art. 6 of the "décret No. 87-806"

727 Lorvellec, L., (1987) Revue de droit rural, No 157, p. 412

728 Gilardeau, J.-M., Juris-Classeur rural, vol. 4, Fasc. C-3, p. 3

729 Dictionnaire Permanent Entreprise Agricole, Table analythique, Quotas laitiers (régime juridique), p. 790; see as examples out-goer schemes of 1985 and 1990: "décret No. 85-709" of 12. 7. 1985, J. O. of 13. 7. 1985, p. 7926, "décret No. 90-884" of 2. 10. 1990, J. O. of 3. 10. 1990, p. 11992

730 Gilardeau, J.-M., Juris-Classeur rural, vol. 4, Fasc. C-3, p. 4; see Art. L. 411-29 Code rural

731 "Circulaire" of 5 Mai 1987 of the Agricultural Ministry, published in (1987) Revue de droit rural, No 158, p. XXIX, see also Gilardeau, J.-M., Juris-Classeur rural, vol. 4, Fasc. C-3, p. 4

732 "cirulaire" of 5 Mai 1987 of the Agricultural Ministry, Gilardeau, J.-M., Juris-Classeur rural, vol. 4, Fasc. C-3, p. 4; Legigan, R., (1991) La propriété agricole, No 192, p. 9

733 Gilardeau, J.-M., Juris-Classeur rural, vol. 4, Fasc. C-3, p. 4

tion for compensation under the out-goer scheme constituted a breach of the tenancy agreement if this stated that the tenant was obliged to run a dairy farm[734]. On appeal, the "Cour d'appel de Douai" concluded that by applying for compensation under the out-goer schemes, the tenant deprives the landlord of a part of his holding's value since reference quantities are attached to land. If the landlord is able to re-rent the holding deprived of the reference quantities without any decrease in the rent, however, there is no loss[735]. It is likely that the landlord's property rights to the quota might be infringed by not requiring his consent to the participation in out-goer schemes[736]. However, the landlord is granted a compensation if the rent decreases because of the loss of quotas. This is why a disproportionate infringement of the right to property is not given in this case.

2. Quota as an improvement

In 1984, the French legislator introduced new provisions in the "Code rural" concerning the compensation of tenants. If the landlord gives a notice to quit (congé) because he or his successors intend to exploit the holding[737], the tenant may, according to Art. L. 411-71 "Code rural", receive compensation for any improvements of technical and economic conditions of the holding. The milk quota is at least considered a licence to commercialise milk and thus it is an economic condition of the exploitation of the holding[738].

734 Tribunal paritaire d'Avesnes-sur-Helpe, Charlet (1987) Revue de droit rural, No 150, p. 56

735 Cour d'appel de Douai, Heuclin (1988) Revue de droit rural, No 161, p. 123; see also Cour d'appel de Dijon, 21 October 1987, quoted by Lorvellec, L., (1988) Revue de droit rural, No 161, p. 125; The "Cour d'appel de Rennes" held on 15 Mai 1991 that a tenant has to pay damages to the landlord because of the loss the holding suffered after the disappearance of the reference quantities, Dictionnaire Permanent Entreprise Agricole, Bulletin 181 (3 Janvier 1992), p. 5667

736 The FNPA (Fédération Nationale de la Propriété Agricole) has asked the Commission for investigations; see Legigan, R., (1991) La propriété agricole, No 192, p. 9

737 Art. L. 411-58 Code rural

738 Gilardeau, J.-M., Juris-Classeur rural, vol. 4, Fasc. C-3, p. 13

III. Legal nature of the reference quantity

The French lawyers hold different views on the legal nature of the reference quantity under French law[739]. Though all recognize that the reference quantities are licences to market a quantity of milk (autorisation administrative à commercialiser) without paying a levy[740], they do not agree on whether the reference quantity is an interest in land (accessoire). According to scholars quotas are not interests in land because they would then belong to the owner of the land. Such a classification, however, would contradict both the tenant's right to apply for compensation under the out-goer schemes without the landlord's consent and the fact that the tenant may retain reference quantities. Reference quantities are considered a right of the producer (droit incorporel accessoire de l'exploitant[741]). Other scholars think that the owner of the land is also the owner of the reference quantities and the producer is only entitled to their use[742].

Finally, some scholars assume that reference quantities are of a nature sui generis that cannot be classified by the existing categories of French law[743]. Reference quantities, according to this opinion, belong to nobody[744] but are mere licences.

739 Gilardeau, J.-M., Juris-Classeur rural, vol. 4, Fasc. C-3, p. 15

740 Gilardeau, J.-M., Juris-Classeur rural, vol. 4, Fasc. C-3, p. 15; de Crisenoy, C., (1988) Cahiers d'économie et sociologie rurales, No 7, p.156; de Crisenoy, C., Les quotas laitiers, p. 68; Lorvellec, L., (1987) Revue de droit rural, No 157, p. 412; Bernard, A., (1987) Revue de droit rural, No 150, p. 51

741 Lorvellec, L., Droit rural, p. 488; Lorvellec, L., (1985) Revue de droit rural, No 136, p. 529, however, after the French legislator incorporated the European transfer rules in a "décret" in 1987, Lorvellec modified his view; see (1988) Revue de droit rural, No 161, p. 125 especially as far as the landlord's rights over the quota are concerned, Lorvellec, L., (1987) Revue de droit rural, No 157, p. 410

742 Bernhard, A., (1987) Revue de droit rural, No 150, p. 54

743 de Crisenoy, C., Les quotas laitiers, p. 67

744 de Crisenoy, C., Les quotas laitiers, p. 68; Tétu, G., (1988) La propriété agricole, No 158, p. 4 concludes: "Les quotas appartiennent à personne"

Chapter V

Implementation of the milk quota regulations in German law

A. Agricultural policy and quota policy

I. Agricultural policy

German agricultural policy has traditionally since the end of the 19th century been protectionist and interventionist[745]. Since the 1950s, the main distinct features of agricultural policy have been to ensure the farmers' incomes and to preserve the family farm[746]. Price support is historically an instrument of securing farmer's incomes[747]. In 1983/84, German farm incomes belonged to the lowest in the EEC with Greece and Italy, considering the nominal values of the income[748]. The German structural policy is criticized for having prevented any improvement of the unfavourable farm structure[749]. Though preserving seems to be an important feature in German agricultural policy, a policy on modernization of farms also has been pursued. Still, structural adjustment is related to a strong social policy[750].

745 Hendriks, G., Germany and European Integration, p. 27 et seq

746 Trede, K.-J., Bundesrepublik Deutschland, in: Priebe, H.; Scheper, W.; von Urff, W. (eds.), Agrarpolitik in der EG, p. 46; Bundesregierung, Agrarbericht 1986, p. 65

747 Hendriks, G., ibid, p. 30

748 Bundesministerium für Ernährung, Landwirtschaft und Forsten (ed.), Statistisches Jahrbuch über Ernährung, Landwdirtschaft und Forsten 1987, p. 374

749 Blumental, M., (1984) 35 N.I.L.Q., p. 29; see also third chapter, A.

750 Trede, K.-J., Bundesrepublik Deutschland, in: Priebe, H.; Scheper, W.; von Urff, W. (eds.), Agrarpolitik in der EG, p. 46

II. Quota policy

The Northern German dairy structure is more efficient than the Southern German one[751]. In 1985, the average yield per cow in the two Northern "Länder" varied from 4,852 kg per annum (Schleswig-Holstein) to 5,363 kg per annum (Niedersachsen). In Bavaria, however, the average yield per cow was only 4,269 kg and in "Baden-Würtemberg" 4,102 kg[752]. In 1985, the average number of cows per farm was 34.3 in "Schleswig-Holstein" and 13.1 in Bavaria[753].

Germany was the only country that initially agreed with the quota system. Both the agricultural Minister and the German Farmers' Union (DBV= Deutscher Bauernverband) supported the milk quota system, because they were convinced that only quotas could save German dairy farmers' incomes[754]. The alternative of cutting dairy prices was opposed by the German government[755]. The German position was quite close to that of the Commission[756].

The German government and the DBV, however, did not agree with two details of the Commission proposals:[757] Both favoured quotas being allocated to producers instead of dairies. Secondly, both urged that more regard should be paid to producers who have invested money into dairy facilities. The principle of legitimate expectation would demand such regard. This demand was supported by some "Länder" like Bavaria, where a lot of investments had been made[758]. To consider producers in special situations was an important issue of the German quota policy[759].

751 Doll, H., Milchquotenregelung, p. 118

752 Zentrale Markt- und Preisberichtstelle für Erzeugnisse der Land-, Forst- und Ernährungswirtschaft GmbH (ed.), ZMP Bilanz '88 Milch, p. 20

753 Zentrale Markt- und Preisberichtstelle für Erzeugnisse der Land-, Forst- und Ernährungswirtschaft GmbH (ed.), ibid, p. 20

754 Hendriks, G., Germany and European Integration, p. 71, Born, H. (1983) top agrar, No 7, p. 3, Agra-Europe 43/83, Europa-Nachrichten, p. 22; Agra-Europe 42/83, Europa-Nachrichten, p. 17, The DBV in fact had proposed a quota system already in 1979, alongside with premiums for the non-marketing of milk, Born, H. (1983) top agrar, No 7, p. 3

755 Agra-Europe 42/83, Europa-Nachrichten, p. 17; Agra-Europe 44/83, Europa-Nachrichten, p. 15

756 Hendriks, G., Germany and European Integration, p. 71

757 Agra-Europe 44/83, Europa-Nachrichten, p. 15; Agra-Europe 43/83, Europa-Nachrichten, p. 22 et seq

758 Agra-Europe 44/83, Europa-Nachrichten, p. 17

759 see Kiechle's demands to complete the Community proposals for producers in special situations; Agra-Europe 44/83, Europa-Nachrichten, p. 15

Reference quantities for producers in special situations were constantly missing. The non-flexibility of the German quota system because of an overallocation of reference quantities, was continuously critized[760].

B. Legal acts incorporating the EEC milk quota Regulations into German law[761]

On the 25th of May 1984, the Agricultural Minister enacted a regulation, the so-called "Milch-Garantiemengen-Verordnung" (MGVO now MGV)[762], in order to incorporate the EEC milk quota Regulations[763]. The MGV was enacted on the basis of the "law for the application of the common organizations of the market (MOG)[764]". The "MOG" authorizes Ministers to enact national measures in order to implement Community provisions[765]. The milk quota regulation is based on the "MOG" because according to Art. 80 German Basic Law the principle of the reservation of law[766] requires a sufficient legal basis in the form of a law for the enactment of subordinate legislation[767]. The MGVO has been amended 22 times (up to January 1992[768]).

760 Nies, V. in: Lukanow, J.; Nies, V., Die Milchgarantiemengen-Regelung, 3rd edition, p. 85; Agra-Europe 5/86, Sonderbeilage, p. 3; Wehland, W., (1989) top agrar, No 3, p. 160; Agricultural Minister of "Rheinland-Pfalz", Agra-Europe 11/89, Kurzmeldungen. p. 21; Gallus, G., Secretary of State of the Federal Ministry of Agriculture; Agra-Europe 11/89, Kurzmeldungen, p. 22

761 The specific regulations concerning the milk quota system in the new "Länder" and direct sales are not explored

762 published in BGBl. I 1984, p. 720

763 six sources of law exist, enlisted according to their hierarchy: the constitution, laws, regulations, statutes, customary law, administrative directives and case law; Ossenbühl, F., in: Erichsen, H.-U.; Martens, W. (ed.), Allgemeines Verwaltungsrecht, p. 75 et seq

764 "Gesetz zur Durchführung der Gemeinsamen Marktorganisationen, MOG"-in the version of 27. 8. 1986, BGBl. I 1986, p. 1397; see Preamble of the MGV of 25. 5. 1984, BGBl. I, p. 720

765 Friedrich, K., (1988) Zeitschrift für Zölle, p. 194

766 enshrined in Art. 2O Basic Law

767 Ehle, D., Abgaben und Erstattungen, in: Kruse, H. W. (ed.), Zölle, p. 224; BFH, (1987) Recht der internationalen Wirtschaft, p. 396

768 latest amendment considered MGV of 20. 12. 1991, BGBl. I 1991, p. 2384; if not indicated other this latest amendment is referred to

C. Institutions charged with the application of the milk quota Regulations

The main institutions which are charged with the application of the super-levy system are the following: the federal financial administration, the agricultural administrative bodies of the "Länder", and the dairies. In the Federal Republic of Germany, administration is carried out either directly by the federal Government or the "Länder" or indirectly on both levels by public institutions, foundations and corporations under public law such as professional corporations[769].

I. Federal financial administration

The federal financial administration is basically competent for the application of the EEC Regulations establishing the super-levy system[770]. The reason is that the federal financial administration is, according to Art. 108 (1) Basic Law and § 12 (1) MOG, charged with the administration of levies for the purpose of regulating agricultural markets[771]. Both federal and "Länder" laws and regulations are regularly carried out by the administrative agencies of the "Länder" with different degrees of control as far as federal laws are concerned[772]. Only a few subject matters enumerated in the constitution such as consumer taxes and special levies are left to the federal administration.

II. Agricultural administration in the "Länder"

The agricultural administration of the "Länder" is part of the general "Länder" administration. The agricultural administration regularly comprises three stages[773]. The inferior stage is competent for the execution of the tasks under the MGV. These are in some "Länder" the local gov-

769 see Rudolf, W., in: Erichsen, H.-U.; Martens, E., Allgemeines Verwaltungsrecht, p. 635 et seq

770 § 2 MGV

771 see Friedrich, K., (1988) Zeitschrift für Zölle, p. 201

772 Art. 83, 84, 85 Basic Law

773 Müller-Glöge, R., Landwirtschaftsverwaltung, in: Handwörterbuch des Agrarrecht, vol. 2, column 374

ernments and in others the agricultural administrative chambers ("Landwirtschaftskammern"). The latter are administrative agencies for agricultural affairs with a compulsory membership and are thus corporations under public law[774]. They are attributed administrative tasks such as information and promotion of farmers[775].

III. Dairies

The dairies, as private enterprises, are also charged with a number of administrative tasks. They are commissioners of the financial administration and thus an assisting organ of the administration[776]. Whether the acts of the dairies under the MGV can be qualified as public law or private law, is not yet clear although this problem is being discussed in Germany[777]. The reason for the discussion is that such an instrument as a levy on exceeding milk quantities is alien to the German legal order[778].

D. Observance of national guaranteed quantity when allocating reference quantities

Germany did not manage to observe its national guaranteed quantity when allocating reference quantities[779]. The procedure for the allocation of reference quantities will subsequently be explained.

I. Allocation of reference quantities concerning deliveries to dairies

Germany has implemented Formula A and according to § 4 MGV, reference quantities are allocated to the producers by the purchasers, the latter being dairies. The producers' reference quantities are calculated according to their deliveries to dairies in 1983 minus a certain percentage.

774 Bendel, B., Landwirtschaftskammern, in: Handwörterbuch des Agrarrecht, vol. 2, column 360

775 Bendel, B., Landwirtschaftskammern, in: Handwörterbuch des Agrarrecht, vol. 2, column 362

776 BFH, (1985) Zeitschrift für Zölle, p. 338; Nies, V., (1988) Agrarrecht, p. 2

777 see Schrömbges, U., (1992) Zeitschrift für Zölle, p. 101 et seq

778 Schrömbges, U., ibid, p. 107

779 Court of Auditors, Special Report No 2/87, O. J. 1987, C 266/10

The German legislator considered almost all categories of producers in special situations, except for small producers and producers realizing a milk development plan after 1984. Young farmers and farmers undertaking farming as their main occupation were considered little[780]. Farmers who have invested in dairy facilities have been carefully considered (§ 6 MGV). According to surveys, this group of producers was allocated 79 % of the reference quantities for producers in special situations[781].

II. Sources from which reference quantities were allocated to producers in special situations

1. Overalloation of reference quantities

In the beginning, German authorities allocated special reference quantities to both producers in special situations who have invested in dairy facilities (§ 6 MGV) and producers whose milk production has been affected by an exceptional event in excess of the national guaranteed quantity (so-called vendor's tray)[782]. In 1984/85, for example, the quantities allocated in excess of the national guaranteed quantity were 1,184,000 tonnes (nearly 5 % of the national quota)[783]. In 1985/86, the over-allocation was still 1,1 million tonnes more than the national quota (4.6 %)[784]. The government was charged with the levy for these exceeding quantities because the producers could only be held liable for their individual excess. In 1985/86, producers paid 131 million DM and the government was charged with 19 million DM, whereas in 1986/87, the government was charged with 167 million DM and producers only paid 151 million

780 Lukanow, J.; Nies, V. in: Lukanow, J.; Nies, V.; Hähnel, W.; Die Milchgarantiemengen-Regelung, 2nd edition, p. 24; § 6 (8) MGV, as amended by Regulation of 27. 11. 1984, BGBl. I 1984, p. 1434; § 6 (8) MGV, as amended by Regulation of 16. 10. 1985, BGBl. I 1985, p. 2008

781 situation in 1989, Doll, H., Milchquotenregelung, p. 39

782 Gomoll, E., (1985) Recht der Landwirtschaft, p. 33; Deutscher Raiffeisenverband (ed.), Die Milchquotenregelung, p. 19

783 Deutscher Raiffeisenverband (ed.), Die Milchquotenregelung, p. 21; Court of Auditors, Special Report No 2/87, O. J. 1987, C 266/10

784 Court of Auditors, Special Report No 2/87, O. J. 1987, C 266/10, this overallocation also occurred in the Netherlands and Belgium, however to a lower extent (about 1 % of the national quota)

DM[785]. Because of the overallocation, a national reserve could not be established[786].

2. Reasons for the overallocation

Once the producers who have invested in dairy facilities fulfill the criteria entirely set out in § 6 MGV, they are entitled to receive a specific reference quantity. The authorities delivered an adminstrative act to set this amount. These act were not delivered on the condition as to the amounts available. The German legislator in drafting § 6 MGV had to undertake the considerable risk of defining criteria in order to separate investments in two parts: those for whom the constitution demands protection and others which need not be protected[787].

It is alleged that the drafters of § 6 MGV were too generous[788]. In other words, the constitution would not have required that all producers be considered. For example, taking into account all investments that were promoted by subsidies without introducing a limit on the amount of money invested[789], is not required by Art. 14 Basic Law, where the right to property is enshrined. Another reason for the excess is, that the German government had, in its initial calculation, underestimated the demand for reference quantities by producers in special situations[790] despite knowing that in Germany many investments in dairy facilities were undertaken in the late 1970s and at the beginning of the 1980s[791].

The fact that there is no deadline for the application of special reference quantities might also have contributed to the excess. In 1992, administrative agencies were still responsible for the calculation of special ref-

785 Deutscher Raiffeisenverband (ed.), Die Milchquotenregelung, p. 21

786 The levy for the quantities delivered that did not exceed the national quota, however, could be used for financing national out-goer schemes; see Art. 5 (c) of Regulation 804/68 as amended by Council Regulation 856/84, O. J. 1984, L 90/10. In the final account of the EAGGF of 1989, for example, the Commission renounced the German levy for the overallocation because Germany had established an out-goer scheme in order to buy out the overallocated reference quantities, see Agra-Europe 51/92, Europa-Nachrichten, p. 13

787 Bundesverwaltungsgericht, (1992) Recht der Landwirtschaft, p. 43; Bundesverwaltungsgericht, (1991) Recht der Landwirtschaft, p. 137

788 Deutscher Raiffeisenverband (ed.), Die Milchquotenregelung, p. 19

789 see § 6 MGV

790 Deutscher Raiffeisenverband (ed.), Die Milchquotenregelung, p. 19; Heeren-Jank, H., (1988) Agrarrecht, p. 341

791 Lukanow, J.; Nies, V. in: Hähnel, W.; Lukanow, J.; Nies, V., Die Milchgarantiemengen-Regelung, 2nd edition, p. 9

erence quantities. Moreover, German farmers have been especially affected by the dismantling of MCAs; the authorities, namely the agricultural administration, generously took their situation into account and did not thoroughly comply with the criteria fixed for the allocation of special reference quantities[792]. In addition, it is alleged that dairies supported generous allocations in order to ensure that their production capacities were exhausted[793].

One judgement that held a provision of § 6 MGV as infringing Art. 14 Basic Law (where the fundamental right to property is enshrined) even rendered a re-allocation of 50,000 tonnes of quotas necessary[794] and was consequently detrimental to the abatement of the German overallocation. The void provision had restricted the allocation of specific reference quantities according to § 6 MGV to the average amount of milk delivered by 80 cows in 1983 in the "Land" in question[795]. One of the reasons for this limit was that the German rules implementing Directive 72/159 on the modernization of farms only envisaged the promotion of investments in dairy facilities of up to 80 cows[796].

3. Efforts undertaken in order to reduce the excess

The Federal government hoped to compensate the excess by underdeliveries of farmers[797]. In fact, the sum of underdeliveries exceeded the sum of overdeliveries in all six campaigns until 1989/90[798]. However, only part of the overallocated sum could be compensated by this method[799]. In addition, it was thought that the excess would be compensated for with national out-goer schemes. But though between April 1984 and September 1986 5.4 % of the levy-exempt quantity could be bought

792 Gomoll, E., (1985) Recht der Landwirtschaft, p. 33; Rohr, H.-J., (1984) Agrarrecht, p. 296; see Doll, H., Milchquotenregelung, p. 39; Heeren-Jank, H., (1988) Agrarrecht, p. 341

793 Rohr, H.-J., (1984) Agrarrecht, p. 296

794 BVerwG, (1989) Recht der Landwirtschaft, p. 71; Deutscher Raiffeisenverband (ed.), Die Milchquotenregelung, p. 20

795 § 6 (6) MGV; reformed rules: regulation of 19. 7. 1989, BGBl. I 1989, p. 1509

796 Rahmenplan der Gemeinschaftsaufgabe "Verbesserung der Agrarstruktur" für den Zeitraum von 1979 bis 1982, Bundestag Drucksache 8/2754, p. 33

797 Rohr, H.-J., (1984) Agrarrecht, p. 296

798 Deutscher Raiffeisenverband (ed.), Die Milchquotenregelung, p. 21

799 in fact, this was possible during the 1984/85 and 1987/88 campaigns, see Deutscher Raiffeisenverband, Die Milchquotenregelung, p. 21

out in Germany (France: 7.6 %, UK: 2.3 %[800]), (mainly due to favourable conditions of the scheme[801]), most out-goer schemes were a failure[802]. One of the explanations is that producers lack alternatives to dairying and the dairy sector is relatively profitable in relation to other subsectors[803]. Only in 1990 did Germany manage to reduce the excess of the national guaranteed quantity[804]. This reduction was carried out firstly by using the "Nallet quota"[805] in order to decrease the excess[806] and secondly by introducing a special out-goer scheme offering a relatively high premium to out-going producers[807].

The Commission has opened infringement procedures under Art. 169 of the EEC Treaty against Germany. In March 1987, however, the Commission decided not to pursue these actions, following undertakings given by the German authorities with respect to the 1987/88 and 1988/89 quota years[808], namely the promise to compensate for the excess with underdeliveries. However, Germany apparently could not thoroughly fulfill these undertakings until 1990.

Germany has infringed Art. 5 (c) of Regulation 804/68 and Art. 5 of Regulation 857/84 which envisage that the Member States may allocate reference quantities only up to their national guaranteed quantity.

4. Consequences of the overallocation

Because of the overallocation there was a lack of reference quantities for producers who had not invested in dairy facilities, but who also found themselves in a special situation for different reasons. That is why out-goer schemes of the "Länder" were constituted[809]. Two other categories of producers in special situations, young farmers and producers undertaking farming as their main occupation, were only considered at the end of 1984 and in 1985, by dividing up a sum of 185,000 and 60,000 tonnes

800 Oskam, A. J. et al, The superlevy - Is there an alternative?, p. 39
801 Oskam, A. J. et al, The superlevy - Is there an alternative?, p. 39
802 Deutscher Raiffeisenverband (ed.), Die Milchquotenregelung, p. 20 et seq
803 Dillen, M.; Tollens, E., Milk quotas, vol. 1, p. 25
804 Bundesregierung (ed.), Agrarbericht 1991, p. 85
805 see second chapter, C. I.
806 Bundesregierung (ed.), Agrarbericht 1990, p. 88
807 Bundesregierung (ed.), Agrarbericht 1991, p. 85
808 Court of Auditors, Special Report No 2/87, O. J. 1987, C 266/11
809 § 6 (8) MGV, as amended by Regulation of 16. 10. 1985, BGBl. I 1985, p. 2008; Bundesregierung (ed.), Agrarbericht 1986, p. 69

between the "Länder"[810]. The "Länder" drafted internal guidelines for the allocation of the reference quantities and thus could ensure that only available reference quantities were allocated[811].

A large amount of trials came before both the financial and administrative courts[812]. Producers challenged the criteria laid out in § 6 MGV as being unconstitutional[813]. Undoubtedly this was also an attempt on the part of the producers to increase their basic reference quantities. Most of the appeals, however, were rejected[814].

Finally, the overallocation, in many respects, prevented the introduction of more flexible provisions in the quota system[815]; the temporary re-allocation of reference quantities (leasing) and regional and national equalization were not introduced until 1990, the rule according to which a large number of reference quantities had to be released to the national reserve after a transfer of reference quantities was only abolished in 1991. Because the underdeliveries were needed to compensate for the overallocation to a certain extent, national and regional equalization and leasing were prohibited[816]. By not allowing the temporary re-allocation, the German legislator wanted also to prevent mitigation of the success of the out-goer schemes which were credited with reduction of the national excess.

E. Implementation of Formula A

The German legislator opted for the Formula A system. In Germany, there are both private dairies and cooperatives of varying sizes and there

810 § 6 (8) MGV as amended by Regulation of 27. 11. 1984, BGBl. I 1984, p. 1434 and by Regulation of 16. 10. 1985, BGBl. I 1985, p. 2008

811 e.g. by decree in Lower-Saxony of 24. 1. 1985, Niedersächsisches Ministerialblatt 1985, p. 89

812 Lukanow, J.; Nies, V. in: Lukanow, J.; Nies, V.; Hähnel, W., Die Milchgarantiemengen-Regelung, 2nd edition, p. 9; Voß, R., Die Milchquoten als Gestaltungsmittel, in: Schwarze, J. (ed.), Der Gemeinsame Markt, p. 64

813 for example: OVG Lüneburg, (1988) Recht der Landwirtschaft, p. 13; BVerwG, (1990) Agrarrecht, p. 57

814 BVerwGE 79, 180 (185); BVerwGE 79, 192 (197), OVG Lüneburg, (1988) Recht der Landwirtschaft, p. 13

815 Bundesminister für Ernährung, Landwirtschaft und Forsten, (1991) Agrarpolitische Mitteilungen, No 7, p. 3

816 see Wehland, W., (1988) top agrar, No. 1, p. 27

is a difference in size between the holdings in Northern and Southern Germany[817]. Because of this diverse structure, equal treatment of all producers had to be ensured and this was the reason for the choice of the Formula A[818]. Moreover, the intention was also not to burden the dairies with the administration of the super-levy system[819]. During the negotiations, the dairies had opted against Formula B[820].

I. Diversity of milk production structure; equalization

One of the disadvantages in the choice of Formula A was the lack of the possibility of equalization within one dairy. German producers have paid the full levy rate (initially 75 % of the target price) since the beginning[821]. But although, since 1984/85, regional and national equalization would also have been possible under Formula A, both the German DBV (German producers' association) and government agreed not to introduce this possibility because underdeliveries were needed to compensate for the national overallocation[822]. Since the abatement of the excess, however, equalization has been carried out within the area of one dairy[823].

The equal treatment of the producers in Germany could be ensured. According to surveys, underdeliveries to dairies vary from 2 % to 10 % in Germany[824] and consequently, the payment of different levy rates would have been likely.

II. Administrative viability

The dairies administer the super-levy system. They calculate the reference quantities including their cut and suspension and those for producers

817 see fourth chapter, A.
818 Bundesregierung (ed.), Agrarbericht 1985, p. 63
819 Deutscher Raiffeisenverband (ed.), Die Milchquotenregelung, p. 11; Nies, V. in: Lukanow, J.; Nies, V., Die Milchgarantiemengen-Regelung, 3rd edition, p. 85
820 Nies, V. in: Lukanow, J.; Nies, V., ibid, p. 85
821 see Court of Auditors, Special Report No 2/87, O. J. 1987, C 266/19 for 1985/86
822 Agra-Europe 11/85, Kurzmeldungen, p. 2; Agra-Europe 11/85, Länderberichte, p. 20
823 Regualation of 17.12.199O, BGBl. I 1990, p. 2911
824 Wehland, W., (1988) top agrar, No 4, p. 117

in special situations[825]. The amount of the levy of each producer is calculated and collected by the dairies and paid to the "Bundeskasse Bremen"[826]. The agencies of the financial administration are, in comparison, simply notified of the amount of reference quantities and levies by the dairies. Legally, however, because the dairies are assisting organs, this notification means that both the fixation of the reference quantities and the levy are regarded as having been determined by the federal administration[827].

The calculation of special reference quantities by the dairies is only carried out if the producer supplies documents from the agricultural administrative agency certifying that the conditions required for a special situation exist[828]. The agricultural administrative agencies were delegated these competences because they supposedly had the expertise to judge data concerning farms[829]. In practice, because of the imprecise wording of the MGV, it was not clear which facts had to be certified by them[830]. A number of judgements were necessary to clarify this problem[831]. In addition, the competence of the agricultural administration to take part in procedures concerning the imposition of levies, was challenged[832]. The challenges were rejected by the courts[833].

Because several authorities were competent for the administration of the super-levy system, many producers did not know which authority was compentent for their appeal. They appealed to both the financial and agricultural administrative authorities[834]. Consequently, the administrative bodies were overloaded with appeals. This was also true for the courts of both the financial and general administrative jurisdiction which were referred to when the appeal was dismissed. Finally, the courts ruled on

825 § 10 (1) MGV
826 § 16 MGV
827 Düsing, M., Milch-Quoten Ratgeber, 2nd edition, p. 75
828 §§ 9 (2) (1) and 10 (1) MGV
829 Düsing, M., Milch-Quoten Ratgeber, 2nd edition, p. 15; BFH, (1986) Zeitschrift für Zölle, p. 150
830 Düsing, M., Milch-Quoten Ratgeber, 2nd edition, p. 11
831 see for example BFH, (1986) Zeitschrift für Zölle, p. 149 and BFH, (1988) Zeitschrift für Zölle, p. 89
832 Nies, V. in: Lukanow, J.; Nies, V., Die Milchgarantiemengen-Regelung, 3rd edition, p. 27
833 BVerwGE 79, 180 (172 et seq), BFH, (1988) Zeitschrift für Zölle, p. 88
834 Voß, R., Die Milchquoten als Gestaltungsmittel, in: Schwarze, J. (ed.), Der Gemeinsame Markt, p. 64

which agency is competent for which acts under the MGV and to which jurisdiction (financial or administrative) the appeals are subject[835].

As shown, dairies were largely responsible for the administration of the super-levy system[836]. On the request of one dairy, the Federal Financial Court held that the delegation of administrative tasks to the dairies was lawful and compared it with employers who under German law have to subtract tax from the wages[837]. However, the state has to respect the principle of proportionality and, taking into account the permanent changes of the EEC Regulations, in particular the cuts and withdrawals of reference quantities, the dairies are disproportionately responsible.

F. Transfer of reference quantities

I. No visible quota markets

Since the incorporation of the milk quota Regulation into German law, the provisions on the transfer of milk quotas have been altered significantly. On the one hand, the rules on the transfer of reference quantities have been liberalized because the excess of the national guaranteed quantity abated[838] and, on the other hand, the relationship between landlord and tenant has made an impact on rules governing the transfer of reference quantities.

The quotas are only transferable assets in that they may be leased out as of 1990/91[839]. In 1990/91, 1.3 % of the national guaranteed quantity was leased out[840]. According to surveys, 8.8 % of the deliveries to dairies in 1983 of Germany were transferred by sale, inheritance or lease of the

835 BFH, (1985) Agrarrecht, p. 154, BFH, (1986) Zeitschrift für Zölle, p. 217; Elsen, H., (1987) Agrarrecht, p. 105

836 Deutscher Raiffeisenverband (ed.), Die Milchquotenregelung, p. 13

837 BFH, (1986) Zeitschrift für Zölle, p. 249

838 Bundesregierung (ed.), Agrarbericht 1991, p. 85

839 Regulation of 3. 7. 199O, BGBl. I 1990, p. 1334; for prices paid see Deutscher Raiffeisenverband (ed.), Die Milchquotenregelung, p. 24

840 according to a survey in autumn 1990, see Deutscher Raiffeisenverband (ed.), Die Milchquotenregelung, p. 25

land up to 1988[841]. Prices and rents for land with quota increased[842] but no visible market of quotas emerged in Germany. However, circumventions of the transfer rules occurred, such as leasing out of quotas before it was allowed in 1990/91[843] or concluding fictitious leasing and sale agreements[844]. The lack of the possibility of leasing until 1990 or other flexible transfer schemes hindered structural adjustment as the the average size of German dairy farms and their reference quantities could not be significantly increased[845]. In addition, the quantities released from the out-goer schemes were mostly used to abate the national excess instead of increasing the producers' reference quantities. This deficit has been constantly deplored[846]. Under which legal scheme the emergence of a visible quota market could be avoided will be explained subsequently.

II. Conditions for the transfer of reference quantities

1. Transactions entailing the transfer of reference quantities

The sale of an entire holding or parts thereof, its lease and the inheritance, are judicial acts which entail the transfer of reference quantities[847]. According to § 7 (5) MGV, the rules on the transfer of reference quantities apply also to transactions that have the same effect[848]. Examples are the return of leased parts of a holding[849] or of an entire leased holding.

Under German law, leases confer exclusive rights of possession (§ 581 BGB). Thus only a transaction which would confer an exclusive right of possession by a lease would entail the transfer of reference quantities. Short-term agreements possible under the German agricultural tenancies law would have to be considered as a sale of grass if they granted no exclusive right of possession. The sale of grass, however, would not have

841 Doll, H., Milchquotenregelung, p. 47

842 Lukanow, J., Rechtsprechung zur Milchgarantiemengen-Regelung, 1st edition, p. 28

843 Riemann, A.; Streyl, H., (1986) top agrar No 12, p. 29

844 Lukanow, J., Rechtsprechung zur Milchgarantiemengen-Regelung, 1st edition, p. 25

845 Wehland, W., (1988) top agrar, No 1, p. 28; see third chapter, A.; Annex

846 Nies, V. in: Lukanow, J.; Nies, V., Die Milchgarantiemengen-Regelung, 3rd editon, p. 85

847 § 7 MGV

848 as amended by Regulation of 27. 9. 1984, BGBl. I 1984, p. 1255

849 enshrined in § 7 (3) (a) and § 7 (3) (b) MGV

comparable legal effects to those brought about by a sale, lease or inheritance of a holding or parts thereof, because the right of possession of the holding or parts thereof would not have been granted.

Thus, transactions require changes in the right of property or possession. Since 1990/91, exceptions have been the temporary re-allocations of reference quantities[850].

2. Formal requirements of the transfer of reference quantities

According to § 9 (2) (3) MGV, the producer has to prove to the purchaser which reference quantities have been transferred to him. This is done through certification by the agricultural agencies of the "Länder".

III. Transfer of reference quantities as a legal effect

The conditions for the transfer having been fulfilled, reference quantitites are transferred without further acts to either the transferee, to the national reserve or are retained by the transferor.

1. Transfer to the transferee

As far as the transfer of an entire holding is concerned, in the case of a transfer by sale, inheritance of lease of an entire undertaking or the restitution of an entire leased farm, the whole amount of the reference quantity is basically transferred to the purchaser, heir or lessor or lessee of the undertaking[851].

As regards the transfer of parts of a holding, the rule is, that in the case of the transfer of parts of a holding by sale, inheritance or lease, milk quotas are transferred proportionately as far as areas used for milk production are concerned. The term "areas used for milk production" has not been defined by the German legislator. The courts agree that they are those parcels that provide forage for the cattle[852]. But apart from this general definition, the term was in many respects interpreted differently

850 Regulation of 3. 7. 1990, BGBl. I, p. 1334

851 see also Düsing, M., Milch-Quoten Ratgeber, 2nd edition, p. 36

852 OVG Münster, (1989) Agrarrecht, p. 110; VG Schleswig, (1987) Agrarrecht, p. 228

not regard extremely short-term agreements as reasonable because the use of short leases is not very economically viable for a holding[860].

2. Transfer of reference quantities to the national reserve

Until 1991, a certain percentage of reference quantities, varying from 20 % to 80 % during the various campaigns[861], was released for the use of the Federal Republic in case of any transfer of land. The released quantities were used for producers in special situations[862] and the provision was also introduced in order to avoid any speculative rise of prices and rents for land[863]. It was doubted whether these provisions were in accordance with the constitution[864]. In 1991, the release of reference quantitites for the benefit of the national reserve in the case of any transfer of land and quota was abolished, mainly because of the abatement of the German overallocation[865].

3. Reference quantities retained by the transferor

According to the German rules, reference quantities may be retained by the transferor if parts of a holding that are transferred do not exceed a minimum surface (at least 1 ha)[866]. This is also true if the amount of the reference quantities transferred exceed a maximum amount. Until 1989/90, only 5,000 kg per ha could be transferred, in 1990/91 this amount was raised to 12,000 kg per ha[867].

The rules on the maximum amount of reference quantities introduced the detachment of a certain amount of quotas from land. The Community Regulations, however, do not expressly authorize the Member States to restrict the amount of reference quantities per ha that may be transferred for the benefit of the transferor[868]. The German provisions on the

860 Riemann, A.; Streyl, H., (1986) top agrar, No 12, p. 29

861 see Regulation of 27. 9. 1984, BGBl. I 1984, p. 1255; Regulation of 21. 2. 1989, BGBl. I 1989, p. 233

862 Bundesregierung (ed.), Agrarbericht 1985, p. 64

863 Bundesregierung (ed.), Agrarbericht 1985, p. 64

864 Düsing, M., Milch-Quoten Ratgeber, 2nd edition, p. 5O; Ahrens, P., (1991) Agrarrecht, p. 184; OVG Lüneburg, (1990) Agrarrecht, p. 288 held that the provision infringes Art. 14 Basic Law

865 Regulation of 2O. 12. 1991, BGBl. I 1991, p. 2384

866 § 7 MGV

867 Regulation of 3. 7. 1990, BGBl. I 1990, p. 1334

868 see Art. 7 (2) of Commuission Regulation 1546/88, O. J. 1988, L 139/12 aut ing the Member States to exclude areas below a surface from the transfer rul

by German administrative agencies and German courts[853]: In
the administrative court of the Northern part of Germany (S
Holstein) demands a concrete use of the land in question for mil
tion[854]. The areas that are used for milk production during a sh
of the year only (e.g. intercrops) are considered as a smaller
than those that are permanently used. Areas that are used for
not considered at all. The highest administrative court of "N
Westfalen" (North-West Germany) uses a more abstract defi
According to its ruling, it is sufficient if areas are used for mi
tion and fodder occasionally. Thus, it may be presumed that all
dairy holding are regulary used for milk production[856]. A
heifers are included. Only parcels that are definitely not use
production such as gardens may be neglected. Because of this
agricultural administrative agencies in the area of this court
abstract definition. This is also true for the administration i
"Rheinland-Pfalz" and "Baden-Würtemberg"[857]. The reaso
different rulings may be regional disparities, because in
Germany there is a higher proportion of permanent grassland.

As far as the role of the agricultural administrative agenc
cerned, it is important to point out that according to German
have to certify every transfer because, otherwise, the dairies
sider the transfers[858]. As regards the apportionment, they ha
whether the quotas were divided up according to the areas us
production. However, in practice, the control is less strict if
agreed on areas used for milk production and the basis of thei
seems to be reasonable[859]. Administrative agencies indicate t

853 Nies, V. in: Lukanow J.; Nies, V, Die Milchgarantiemengen-Regel
tion, p. 36; Hähnel, W. in: Lukanow, J.; Nies, V.; Hähnel, W., Die M
mengen-Regelung, 2nd edition, p. 38

854 VG Schleswig, (1987) Agrarrecht, p. 226; VG Schleswig, (1987)
229, OVG Lüneburg, not published see Düsing, M., Milch-Quoten
edition, p. 42

855 OVG Münster, (1989) Agrarrecht, p. 109; Düsing, M., Milch-Quo
2nd edition, p. 42

856 OVG Münster, (1989) Agrarrecht, p. 109

857 Düsing, M., Milch-Quoten Ratgeber, 2nd editon, p. 42

858 § 9 MGV

859 according to Düsing, M., Milch-Quoten Ratgeber, 2nd edition, p. 41

maximum amount thus have no expressed legal basis[869]. As to the retention of reference quantities by the tenant see below.

G. Position of the tenant

In Germany, in 1983, 32.9 % of the area used for agriculture was tenanted[870]. The proportion of tenanted areas has increased steadily since 1971[871]. Only 3 % of this area is used for tenancies on entire holdings; whereas the rest is tenanted as parcels[872]. The lease of parcels is an important feature in German structural policy because the lease enables the farmers to increase their relatively low amount of farmed land[873]. In 1952, the agricultural tenancies law was drafted in a liberal way in order to ensure the necessary mobility of land[874]. In 1985, the law was reformed and the position of the tenant was improved with regard to the change of the use of the holding[875], compensation for investments[876] and periods of notice. However, all new provisions may be altered by way of contracts[877]. The relationship between landlord and tenant is left entirely to the parties, only a few dispositions of the agricultural tenancies law are mandatory[878].

869 Lukanow, J. in: Lukanow, J.; Nies, V., Milchgarantiemengen-Regelung, 3rd edition, p. 69; see also BVerwG, (1992) Recht der Landwirtschaft, p. 161

870 Bundesministerium für Ernährung, Landwirtschaft und Forsten (ed.), Statistisches Jahrbuch über Ernährung, Landwirtschaft und Forsten, 1985, p. 39

871 Bundesministerium für Ernährung, Landwirtschaft und Forsten (ed.), Statistisches Jahrbuch über Ernährung, Landwirtschaft und Forsten 1985, p. 39

872 Hötzel, H.-J., Einleitung, in: Faßbender, J.; Hötzel, H.-J.; Lukanow, J., Landpachtrecht, p. 31

873 Hötzel, H.-J., Einleitung, in: Faßbender, J.; Hötzel, H.-J.; Lukanow, J., Landpachtrecht, p. 31; Trede, K.-J.; Filter, W., Agrarpolitik und Agrarsektor in der Bundesrepublik Deutschland, p. 20

874 Lukanow, J., § 581 BGB, in: Faßbender, J.; Hötzel, H.-J.; Lukanow, J., Landpachtrecht, p. 64

875 § 590 BGB

876 §§ 590 b, 591 BGB

877 Lukanow, J., (1989) Agrarrecht, Supplement I/2, p. 11

878 Lukanow, J., (1989) Agrarrecht, Supplement I/2, p. 13

I. Retention of reference quantities by the tenant

In order to understand the German regulations implementing Art. 7 (4) of Council Regulation 857/84, the German rules on the termination of a lease will be explained. Under German law, no minimum length of tenancy is fixed.

Tenancies may firstly be terminated by notices of termination both from the landlord and the tenant. As of 1986, leases for an unlimited period must be terminated with two years' notice[879] (before 1986, half a year[880]). However, this period can be reduced by contract[881]. Secondly, leases are terminated on the expiration of the period for which the contract was concluded[882]. In these cases, the tenant may ask for extension of the tenancy. If the landlord does not refuse, the tenancy automatically becomes an unlimited tenancy. However, the landlord is entirely free to agree or not.

In the case of expiration of the tenancy or if the tenant has received a notice to quit, the tenant is under exceptional circumstances entitled to the extension of the tenancy[883]. This is a mandatory disposition. If there is a disagreement between the tenant and the landlord, a civil court may be referred to[884]. This is the only provision of the agricultural tenancy law which aims to protect the tenant on termination of the lease[885] and has not been changed by the reforms[886]. Extension is, however, only granted if the termination of the tenancy causes exceptional hardship for the tenant and his family and endangers his economic existence. In practice, there are rare cases in which this endangering is accepted[887]. In addition, courts only grant a transitional period to the tenant[888]. The extension is both granted to tenants farming an entire holding or parts of a holding.

879 § 594 (a) BGB

880 § 595 BGB old version, see Faßbender, J., § 594 a BGB, in: Faßbender, J.; Hötzel, H.-J.; Lukanow, J., Landpachtrecht, p. 436

881 § 594 a (1) BGB, however, such an agreement should be concluded in writing

882 §§ 594 a, 594 b, 594 BGB

883 § 595 BGB

884 § 595 BGB

885 Lukanow, J., § 595 BGB, in: Faßbender, J.; Hötzel, H.-J.; Lukanow, J., Landpachtrecht, p. 481

886 Lukanow, J.; § 595 BGB, in: Faßbender, J.; Hötzel, H.-J.; Lukanow, J., Landpachtrecht, p. 482

887 Lukanow, J., (1989) Agrarrecht, Supplement I/2, p. 10

888 Lukanow, J., (1989) Agrarrecht, Supplement I/2, p. 10

Though the tenant may suffer from exceptional hardship, he is not entitled to be granted an extension if the landlord reclaims the holding or parts thereof because he or his family want to exploit it[889].

It remains to be seen whether, if the tenant extends his contract, similar conditions (in particular the rent), would apply. The amount of the rent is not regulated by legal provisions, but may be freely negotiated by the landlord and tenant[890]. If the tenant's contract is extended by the civil court, the civil court may increase the rent[891].

To sum up, German tenants are rarely entitled to extensions of their lease on similar terms.

1. Restitution of parts of a holding

As early as 1984, the German legislator introduced a regulation to grant reference quantities to tenants on the termination of the lease[892]. Those tenants who signed the contract before the 2nd of April 1984 and who had to return parts of a holding, had only to restitute the reference quantities attached to areas that exceeded 5 ha[893]. The German legislator wanted to consider those tenants who had exercised milk production on the leased land before the introduction of the quota system (so-called "old" contracts). The group of tenants protected was seen as being deprived of the reference quantities. In addition, no reference quantities are transferred if the size of the surface is below a certain threshold (see above).

In 1989, the Federal Administrative Court held that the German legislator had not been competent to introduce the protection of the tenant by detaching reference quantities from land without any authorization by the Community legislator[894]. Since 1985, Regulation 857/84 has provided for a legal basis for the retention of reference quantities by the quitting ten-

889 § 595 (3) BGB

890 only if the amount of the rent is disproportionate to the profit the tenant gains from the holding, the agricultural administrative agencies to which the contract must be certified, may object to the rent agreed upon, see § 4 Landpachtverkehrsgesetz, Hötzel, H.-J., in: Faßbender, J.; Hötzel, H.-J.; Lukanow, J., Landpachtrecht, p. 698 et seq

891 § 595 BGB

892 Regulation of 27. 11. 1984, BGBl. I 1984, p. 1434

893 § 7 (3) (a) MGV, Regulation of 27. 11. 1984, BGBl. I 1984, p. 1434

894 BVerwG, (1990) Agrarrecht, p. 219; Düsing, M., Milch-Quoten Ratgeber, 2nd edition, p. 68; Barnstedt, E., (1985) Agrarrecht, p. 97; Nies, V., (1989) Recht der Landwirtschaft, p. 2O1

ant[895]. That is why the same provision that had been declared void by the Federal Administrative Court was re-enacted after the judgement[896].

Later amendments after the enactment of Council Regulation 590/85 enforced the protection of the tenant: If the contract was signed before the 2nd of April 1984 and more than 5 ha are restituted, only half of the reference quantities, at most 2,500 kg per ha, is restituted to the landlord[897]. The provision on the protection of the "old contracts tenants" has been vaguely formulated and the tenant's intention of continuing milk production is not required. Some courts tried to restrict generous interpretations of the protection clause[898].

In the case of the restitution of leased parts of a holding for which the contract was signed after the 2nd of April 1984, the tenant has to restitute the whole amount of the reference quantities to which he was still entitled[899].

2. Restitution of entire holdings

If an entire leased holding is restituted tenants have to transfer the whole amount of reference quantities to the landlord. This rule also applies to contracts that were signed before the MGV came into force. The tenant of an entire holding, however, is in the same difficult economic and social situation as the tenant of parts of a holding because he may only under exceptional circumstances ask for the extension of the lease. The economic background of the German refusal to grant reference quantities to out-going tenants of an entire holding may be, that in entire holdings, the landlord's share prevails the tenant's share because the capital seems to be the most important factor. In addition, entire holdings rented in Germany are leased for a fixed term without any entitlement to extension. Thus, tenants could not in any case expect that they could make use of their investments including licences for commercialisation which have been allocated to them by public authorities[900].

895 Art. 7 (4) of Regulation 857/84, as amended by Council Regulation 590/85, O. J. 1985, L 68/1; see second chapter, E. I. 1.

896 Regulation of 21. 3. 1990, BGBl. I 1990, p. 556

897 see Regulation of 11. 9. 1985, BGBl. I 1985, p. 1916

898 OVG Lüneburg, (1992) Agrarrecht, p. 264; BVerwG, (1992) Recht der Landwirtschaft, p. 161

899 § 7 (3) (b) MGV, introduced by Regulation of 18. 6. 1986, BGBl. I 1986, p. 911

900 Lukanow, J. in: Lukanow, J.; Nies, V., Milchgarantiemengen-Regelung, 3rd edition, p. 63

II. Compensation rights as to reference quantities

1. Out-goer schemes

Under the German provisions, the landlord's consent is required if the tenant who has rented an entire holding applies for the premium under an out-going scheme[901]. In most out-goer schemes, tenants who have rented parts of a holding do not need to ask for the landlord's permission if they apply for a premium[902]. But according to the agricultural tenancies law, they have to ask for permission if they change the use of the rented object to an extent that affects the holding after the expiration of the lease[903]. According to § 591 b BGB, the landlord may ask for compensation if the conditions of the holding have deteriorated.

2. Quota as improvement of the holding

No special provisions concerning the compensation for milk quotas for quitting tenants were introduced in the agricultural tenancies law[904]. Tenants generally receive compensation for certain investments that contribute to the improvement and maintenance of the rented object. The Federal Civil Court held that although a restituted holding has a higher value with a milk quota this improvement is not due to the tenant's investments, but to the introduction of the milk quota system by the legislator[905]. The tenant's investments in dairy facilities like parlours or the purchase of quotas, of course, may be compensated.

III. Infringement of fundamental rights of tenants of entire holdings

The position of the tenant of entire holdings gives rise to constitutional doubts.

If he has to restitute an entire holding rented before 1984, he is not entitled to retain any reference quantities. An infringement of his right to

901 §§ 3 (2), 8 (3), 13 (3) "Verordnung über die Gewährung einer Vergütung für die Aufgabe der Milcherzeugung", BGBl. I 1987, p. 1699

902 first and third scheme see §§ 3 (2); 13 (3) "Verordnung über die Gewährung einer Vergütung für die Aufgabe der Milcherzeugung", BGBl. I 1987, p. 1699

903 Nies, V. in: Lukanow, J.; Nies, V., Die Milchgarantiemengen-Regelung, 3rd edition, p. 84

904 §§ 585-597 BGB

905 BGH, (1991) Agrarrecht, p. 343

property is likely[906]. A disproportionate deprivation of his property right is given because the aim pursued with the restrictive rule (to ensure the observance of the principle of attachment to land) cannot in this case be justified since the tenant suffers an unacceptable economic loss[907]. In particular, his labour which contributed to the creation of the quota is not compensated for under the German agricultural tenancies law and the landlord's consent is required for the cessation of milk production. The Federal Administrative Court, however, held that the agricultural tenancies law is enough to ensure the protection of the tenants of entire holdings because the tenant may ask for compensation for his investments in dairy facilities[908]. Because quotas are not improvements but creations of public authorities, this view seems to be dubious[909].

As far as the requirement of the landlord's consent is concerned, one inferior administrative court held that the basis for the allocation of quotas is limited to the reference year and the fact that the producer delivered milk in that year[910]. Hence the producer is entitled to the whole of the quota and the landlord's consent is not required[911]. The ownership of the land and the live and dead stock of the holding are of no importance for the creation of the quota[912]. This assumption is doubtful because the production factor soil also contributed to the allocation of reference quantities[913].

906 see also Düsing, M., Milch-Quoten Ratgeber, 3rd edition, p. 43 et seq

907 see for the formula: Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft, [1989] E.C.R., p. 2609 (2639)

908 BVerwG, (1991) Recht der Landwirtschaft, p. 102

909 see Nies, V., (1990) Agrarrecht, p. 225

910 VG Frankfurt, (1990) Agrarrecht, p. 288

911 the court, however, does not specify whether the producer is the owner of the quota, VG Frankfurt, (1990) Agrarrecht, p. 289

912 VG Frankfurt, (1990) Agrarrecht, p. 288

913 Nies, V., (1990) Agrarrecht, p. 225

IV. Legal nature of the reference quantity

German lawyers and courts agree that the reference quantity is a right to commercialise a certain amount of milk or milk products without being subject to a levy[914].

Whether this right is a real right has been discussed by lawyers and the courts. The only possibility under German property law would be that the reference quantity is a right attached to the property of the land and as such, the reference quantity could be an essential part of the land (§ 96 BGB). However, the courts ruled that the reference quantity is not attached to the property of the land[915]. Reference quantities are allocated to persons and are attached to the holding, but not to the property of the holding[916]. In other words, the German courts recognized that the reference quantity according to the categories of property law does not belong to anybody, but is a licence allocated to the producers[917]. German scholars are of the same opinion[918]. In particular, the statutory provisions on the retention of quotas did not resolve the question of the ownership of the quota because the quota is simply divided up.

914 Lukanow, J., Nies, V. in: Lukanow, J.; Nies, V.; Hähnel, W., Die Milchgarantiemengen-Regelung, 2nd edition, p. 28; p. 49; BGH, (1992) Agrarrecht, p. 56; OLG Celle, (1988) Agrarrecht, p. 170 et seq

915 OLG Celle, (1988) Agrarrecht, p. 170; BGH, (1992) Agrarrecht, p. 56

916 BGH, (1992) Agrarrecht, p. 56

917 see, however, the ruling of the administrative court of Frankfurt (under G. III.) which, however, did not specify whether the producer is the owner of the quota

918 Palandt-Heinrichs, H., Bürgerliches Gesetzbuch, § 96 BGB, Annotation 2; Lukanow, J. in: Lukanow, J.; Nies, V.; Hähnel, W., Die Milchgarantiemengen-Regelung, 2nd edition, p. 49, see also guidelines of the Federal Ministry of Agriculture, Food and Fisheries of 4. 3. 1986, published in: Agrarrecht 1986, p. 255 et seq

Chapter VI

Comparison of the implementations of the milk quota regulations in English, French and German law

The comparison of the implementation of the Community objectives considered is carried out by way of microcomparison. This means that specific legal institutions or problems are compared[919] in order to find out whether the Community objectives were achieved. Where necessary the legal issues are completed by references to the policy-formulation phase and the socio-economic conditions in order to reveal the objectives of the Member States.

A. Choice of different Formulas

In order to repeat the reason for the choice between two Formulas, the Community legislator intended when granting this choice, to take into account the administrative problems arising, the diversity of the milk production structures in the different regions of the Community and the regional development policy[920]. Despite the different possibilities of equalization under each Formula, equivalence of results under both Formulas was envisaged in the beginning by fixing a different amount for the levies. The question arises as to whether these objectives were implemented[921].

919 Zweigert, K.; Kötz, H., Introduction to comparative law, vol. 1, p. 5
920 Preamble of Council Regulation 856/84, O. J. 1984, L 90/10
921 Regional development policies are not compared

I. Taking into account administrative problems arising

One reason for providing two different Formulas was to allow for administrative problems that might arise. As outlined in the second chapter, this means that Member States could adopt the Formula that is most suitable for their administrative structure and thus ensure its administrative viability.

1. Formula B countries: UK and France

a) Number and tasks of the administrative units involved

The application of the same Formula in the UK and France for their regions was carried out through a different administrative structure that was already provided by the existing administrative bodies or producers' organizations. The number of administrative units involved in the allocation of reference quantities to producers in special situations in the UK was significantly smaller than in France. In the UK, only the Ministry or the Tribunal allocated these quantities, whereas in France, in particular the Ministry, ONILAIT, the purchasers and "la commission mixte départementale" were involved. The procedures of allocating special reference quantities were more complicated in France, clearly reflecting the predominant concern of these groups of produceps.

The Agricultural Ministry conferred many tasks on the MMBs. In fact, the MMBs exercised functions that in France were divided between the French dairies and the "préfet", such as the notification of the transfers. ONILAIT, however, has similar functions to the Ministry of Agriculture and IBAP.

b) Legal status and numbers of the purchasers

Both the British and French purchasers were at the same time recipients of administrative actions in that they had to pay the levy and they were implementers in that they had to collect the levy from the producers. Nevertheless, the MMB is a semi-public co-operative and as an agent of the Ministry, it holds a different position in the state administration than the private French dairies do. Difficulties as to the legal nature of the acts of the purchasers did not arise in the UK.

The most striking issue is that the number of purchasers in the UK were the five MMBs[922], whereas in France, the number of purchasers was 1322 in 1985[923]. The consequence of this low number of purchasers was that the UK quotas could be allocated more efficiently because of the structure provided by the MMBs including the registers the MMBs held on producers.

Moreover, because of the MMB's monopoly for purchasing fresh milk and its huge collection area, the fight for producers in order to exhaust production capacities that occurred between dairies in France did not happen between dairies in England and Wales[924]. Striking infringements of the allocation rules by the MMBs have not been recorded. Yet the MMB owns manufacturing creameries and dairies, whose administration and financial management are, however, separate[925]. But the MMB had, because of its huge, centralized collection area, no vital economic interest in falsifying producers' reference quantities at the expense of other producers, for example in order to attract producers from other Board areas. The control by the producers, institutionalized by the Board, may have contributed to this fact.

In addition, since there was a lack of rivalry among dairies, the emergence of the quota market was favoured because transfers within the huge regions of the MMBs would not result in a transfer of reference quantities from one purchaser to the other and affect the volumes of milk delivered to dairies.

Because of a low number of purchasers, the control of the MMBs was, in fact, much easier to enforce in the UK than in France. However, both in France and in the UK, purchasers did not comply with the rules of transfer. In the UK, this occurred with the silent consent of the Ministry, whereas in France, any circumvention of the rules endangered the state-controlled restructuring process. Thus, the relationship between public authorities in France (including ONILAIT) and the purchasers was characterized by tension and distrust. The UK purchasers and the Ministry, on

922 the purchasers in the small areas that are not subject to Board areas can be ignored

923 see Bundesministerium für Ernährung, Landwirtschaft und Forsten (ed.) Statistisches Jahrbuch über Ernährung, Landwirtschaft und Forsten 1987, p. 411

924 Burrel, A., (1988) Cahiers d'économie et sociologie rurales, No. 7, p. 79

925 Anderson, P. D., (1978) 5 Agricultural Administration, p. 133

the other hand, worked confidently together which was supported by the fact that the MMB was an agent of the Ministry.

To sum up, the implementation of Formula B in France caused more difficulties than in England and Wales. The administrative structure, namely the existence of compulsory producers' organizations such as the MMBs, provided by the British system was much more suitable for implementing Formula B than that of the French. By conferring most of the administration of the super-levy system to the MMB, the UK exercised the institutional autonomy the Member States enjoy when implementing the Community Regulations.

The EEC legislator employed the broad term "purchaser" and thus allowed that not only dairies but also producer's organizations like the MMB could be defined as purchasers. Both are the first purchasers of fresh milk. This definition lies within the discretion enjoyed by the EEC legislator[926] and any discrimination between producers in Formula B countries is not apparent.

2. Formula A and B countries : UK, France and Germany

a) Number and tasks of the administrative units involved

In Germany, which adopted Formula A, both private and state organizations (dairies and financial administration) were involved in the allocation of reference quantities to producers. In the UK, only the MMBs and in France, only the dairies, allocated reference quantities to the producers. This is due to the Formula, because under Formula B the debtors are the purchasers and the state administration is thus only involved in allocating reference quantities to purchasers.

As far as the allocation of additional and specific reference quantities is concerned, the agricultural administrative agencies were also conferred with tasks. The allocation of additional reference quantities can thus be compared with the French and English system, where the Ministry, ONILAIT, the dairies and the "commissions mixtes", respectively the Ministry and Tribunals, were involved.

The German objective when implementing Formula A of not burdening the dairies with administrative tasks and thus ensuring administrative viability, could not be fulfilled. In comparison with the purchasers in

926 Case 197-200, 243, 245 + 247/80 Ludwigshafener Walzmühle v Council and Commission [1981] E.C.R., p. 3211 (3251)

France, the German dairies had been conferred the same number of tasks. The reason is that, for practical reasons dairies could more easily calculate producers' reference quantities and levies than other administrative bodies in the German administration.

In Germany, problems arose as to which administrative agencies were competent for which parts of the administration of the quota system. This, however, was not caused by the application of Formula A but by the introduction of the peculiar combination of a super-levy (financial administration) connected with a reference quantity (criteria for the allocation of these in the case of special situations and transfer is part of agricultural administration) into the existing German administrative system.

b) Legal status of the purchasers

The private German dairies were, in fact, responsible for the administration of the milk quota system, though legally the dairies were only assisting the financial administration.

No producers' organizations such as the MMBs, which could have been conferred with the administration, exist in Germany. The apparent advantage of Formula A, that reference quantities are only allocated at one level in the state administration, was not true for the German dairies. However, Formula A could presumably prevent the fight for production capacities by illegal administration of the quota system to a certain extent, because the debtors are the producers. The German dairies were implementers but no recipients of administrative action as far as the levy is concerned. Moreover, the allocation of reference quantities to producers is administered by the state and the dairy's allocation only becomes valid if they notified the amount to the financial administration. Under the British and French system, the allocation of reference quantities to the producers is a matter of private law whereas the allocation of reference quantities under German law constitutes an administrative act.

German dairies could not favour producers by equalization or by allocation of special reference quantities because until 1990, equalization has not been allowed and it is the agricultural administration which determines whether a producer is treated as being in a special situation.

To sum up, only in the UK could the objective of ensuring the administrative viability by the choice of the Formula be realized to a satisfying extent. However, administrative viability was only one criterion for the

choice of the Formula[927], apparently not the decisive one for France and Germany.

II. Diversity of milk production structure

With the choice between Formulas, the Community legislator wanted to take into account the diversity of the milk production structure, in particular the need to facilitate structural change and adaption. This vague formulation apparently meant both the diversity between Member States and the diversity within the Member State. In brief, the possibility of equalization would be ideal for facilitating structural adjustment and the non-possibility of equalization would be ideal for a Member State with diverse milk production and milk-collecting structures. The Formulas could, consequently, according to the EEC Regulations, be implemented into regions with diverse structures or into the whole Member State.

The UK had, in the first year, applied Formula A in Northern Ireland, where the production structures are different from England, Wales and Scotland. In the UK, the equalization of over- and underdeliveries within the collection zone of one purchaser comprised a much higher number of producers than in France. Thus, the phenomenon of the "dead quotas" occurring in France in the beginning was not a problem in the huge MMB regions (especially in England and Wales). In addition, again because of the low number of purchasers, problems of unequal treatment between producers of different purchasers, especially producers in special situations did not occur in the UK to such an extent as in France. Diverse production and collection structures did thus not have a negative impact on the application of Formula B in the UK.

Germany and France both implemented the same Formula for the whole territory. Either the same Formula fitted by chance into entirely diverse regions or else the consideration of diverse structures within the Member State was not such an important issue.

In the case of Germany, accounting for diverse production structures in the North and South and diverse collection-structures of the dairies, the equal treatment of all producers as to the levy rate could be ensured[928].

927 see Art. 2 (1) of Regulation 857/84
928 Wehland, W., (1988) top agrar, No 1, p. 28

The impossibility of obtaining temporarily re-allocated reference quantities by leasing or by way of equalization, however, could not contribute to the facilitation of any significant structural adjustment because producers could not rely on unused reference quantities at the end of the campaign[929].

It would have, considering the milk production structures, been possible to incorporate the Formula B in Southern Germany in order to allow adaption and facilitate structural change for the less efficient Southern producers and the Formula A in Northern Germany in order to guarantee an equal treatment of the producers. It would also be possible to incorparate Formula B into the whole of Germany if the structural adjustment of the whole country had been a political objective.

The French dairy structure, as far as regional diversities and variation between collection zones is concerned, is much more similar to the German than to the British one and the number of French purchasers is even higher than the German one. The problems of unequal treatment of producers of different dairies thus had to be mitigated in France by introducing some elements of Formula A. Another problem of the high number of purchasers was that "dead quotas" came into existence.

It can be assumed that, considering the general quota policy, the French objective was not principally that of taking into account diverse production and collection structures within the country, but that of profiting from the advantage under Formula B of re-allocating unused reference quantities in order to facilitate structural change for the whole of the country. The diverse production structure within France was taken into account through different instruments such as the allocation of reference quantities to producers in special situations, the setting up of out-goer schemes, and the special treatment of mountain areas. With these instruments, the restructuring of the dairy sector could be pursued, and the Formula had only to soften the process.

The ECJ has ruled that Member States enjoy great discretion in determining the Formula unless the choice obviously does not comply with Member States' structures[930]. The ECJ, however, does not define when

929 see Wehland, W., (1988) top agrar, No 1, p. 28; Nies, V. in: Lukanow, J., Nies, V., Die Milchgarantiemengen-Regelung, 3rd edition, p. 85

930 see Case C-267/88 - C-285/88 Wuidart et al v Laiterie coopérative eupenoise et al [1990] E.C.R., p. I-435 (I-486)

there is no compliance with structures. From the comparison it can be deduced that each Formula is obviously suitable to all kinds of production structures. Thus, the Germans could have opted for the same Formula as France and vice versa without exceeding their discretion.

To sum up, every country chose a Formula for entirely different reasons, clearly reflecting their attitude towards the quota system. The Germans opted mainly for Formula A in order not to disrupt the unity of the farm community. The French opted for Formula B because their political goal was to restructure the whole of the country by administrative means. The UK opted for Formula B because the administrative structure provided by the MMBs was ideal and the possibility of equalization would reduce the levy liability.

Most objectives pursued by the Member States through the choice of Formula could be achieved; however, the administration in Germany proved to be more complicated than expected and France had to recognize that they had neglected their internal structures to benefit the structure of the whole country.

The objectives that were pursued by the Community legislator in offering the choice between two Formulas are thus only a conglomerate of these diverse attitudes. The question arises, however, as to whether the implementation of a levy by entirely diverse Formulas does not give rise to discrimination between producers, especially as far as the amount of the levy paid is concerned. The Council has probably infringed its discretion when granting the choice between two Formulas.

III. Amount of the levy-rate paid by producers under Formula A and B

Under Formula A, the original Regulations envisaged a levy-rate of 75 % and under Formula B, 100 % of the target price in order to offset the disadvantages of Formula A. However, as was proved in the national reports, the differences in the amount of the levy paid by German producers in comparison to French and English producers, before Formula B was reformed, was much larger than 25 %. This was confirmed in a report by the Court of Auditors in 1987[931].

931 O. J. 1987, C 266/7

The discrimination between producers under Formula A and B seems to be apparent. In a preliminary ruling, the ECJ, however, held that the choice granted to Member States between Formula A and B did not breach the prohibition of discrimination between Community producers, rather, it ensured that the system was fully effective in view of the diversity of milk production structure and milk-collecting in the different regions of the Community[932]. Belgian producers, subject to Formula A, had alleged the breach of the principle of non-discrimination. To prove that no discrimination was given, the ECJ pointed to both the different levy rates under Formula A and B and to the possibility of regional and national equalization for both Formulas. By these provisions, the possibility of offsetting at the level of the purchasers under Formula B was neutralized and equivalence in the actual levels of the levy under the two Formulas was ensured. Though the difference between the levy actually paid by producers under the Formula A system in comparison to a Formula B producer in practice turned out to be much higher than 25 %, this did not constitute an infringement of Art. 40 (3) of the EEC Treaty, because the Council had broad discretion in matters concerning agricultural policies. This discretion has not been abused according to the ECJ, because the Council could reasonably assume that a difference of 25 % would be sufficient to neutralize the advantage which producers under Formula B enjoy.

If the Council had not introduced the possibility of regional and national equalization, the Court would probably have ruled that the choice between two Formulas gave rise to discrimination. However, the possibility of introducing regional and national equalization is not a mandatory provision. This fact was not considered by the ECJ. The reason may be that a Belgian court had referred to the ECJ for a preliminary ruling and in Belgium, the possibility of equalization has been introduced[933]. In Germany, only in 1990 was the offsetting at dairy level allowed. This constitutes an unequal treatment of German producers towards the others in the Community by the German government. However, an infringement of Art. 40 (3) of the EEC Treaty by the Council when providing for only

932 see Case C-267/88 - C-285/88 Wuidart et al v Laiterie coopérative eupenoise et al [1990] E.C.R., p. I-435 (I-480)

933 Commission of the European Communities, Report to the Council on the application of the super-levy system of 17. 11. 1986, COM (86) 645 final, p. 13

a facultative possibility is not apparent because the collected levy could be used for financing national out-goer schemes if the deliveries did not exceed the national quota[934].

B. Observance of the national guaranteed quantity when allocating reference quantities

When allocating reference quantities, in particular to producers in special situations, Member States were obliged not to exceed their national guaranteed quantity. Germany infringed this principle. France and the UK, however, managed to observe their national guaranteed quantities. By comparing the legal principles and procedures determining the allocation, the reasons might be discovered.

The criteria that the German producers undertaking investments into dairy facilities had to fulfill to be eligible for a specific reference quantity are defined in § 6 MGV. This provision gives a direct right for the allocation of reference quantities, once the producer meets the criteria. In addition, the adminstrative acts delivered to the producers fixed the reference quantities without any conditions as to the amounts available. Whether a producer meets the requirements under § 6 MGV was decided by the agricultural administration which in most cases was to the benefit of the producer. The ceiling of the 1983 deliveries of 80 cows in the "Land" in question, moreover, has been declared void by the courts because of an infringement of the right to property. This judgement concerned a producer from Lower-Saxony, where the limit was 406,400 kg[935].

In France, no direct rights for the prior producers derive from the "décrets" and "arrêtés". Instead, producers are allocated reference quantities yearly depending on how many quantities were made available by the out-goer schemes. In addition, the limit of 200,000 litres was a restriction imposed so as not to overallocate reference quantities. This was recognized by the ECJ, who did not, however, rule on whether the right to property was infringed. The referring court had not alleged such an infringement.

934 see second chapter, F. I. 2.
935 BVerwG, (1989) Recht der Landwirtschaft, p. 72

In the UK as well, no direct rights arose from the Dairy Produce Quota Regulations but the British producer received an award by the authorities over an amount of secondary reference quantities on condition that quantities are available.

The German producer was not subject to any deadline when applying for specific reference quantities, whereas the English producer had to meet different deadlines as soon as a new special case provision was made.

To sum up, the German rules prove to be very awkward. Because these rules grant direct rights to one large group of producers in special situations[936] and the authorities do not allocate reference quantities on condition of their availability, the authorities were obliged to allocate reference quantities to the producers who observed the requirements. The constitution, in particular the principle of legitimate expectation, would not have required any such legal construction of the regulations. This proves that the German farmers' organization could exercise a considerable influence on the draftsmen. The British and French legislators have set up more convincing schemes by allocating reference quantities only if they are available. In France, however, the draftsmen might have expected that the state-financed restructuring programs, in particular the out-goer schemes, would provide enough reference quantities during the various campaigns to satisfy the prior producers.

C. Transfer of reference quantities

The intention of the Community legislator was to avoid any speculation of reference quantities and a rise of markets. The EEC objective was supposed to be fulfilled by having the transfer governed by the principle of attachment of reference quantities to a holding and defining which changes to the holding entail a transfer of reference quantities. Rules on the apportionment of quotas and on the restriction of the number of ha and quantities per ha that may be transferred were enacted because of the same intention. Last but not least, the non-legislation on the ownership of the reference quantity can be explained by the same intention.

936 the producers whose milk production has been affected by an exceptional event also contributed to the overallocation, see German Report

I. Emergence of quota markets

In the UK, a market of quotas developed in that the quota became a tradeable asset in its own right. This was possible by circumventing the transfer rules but also by employing legal forms of transfers, in particular temporary transfer arrangements. The control and pressure by the Commission were legal constraints, requiring the UK government to tighten up the transfer rules. The fact that the Community rules did not specifiy the legal nature of the reference quantity could not prevent the quota from becoming tradeable.

No visible market of quotas developed in France, though some black markets allegedly exist. The French objective of subjecting the transfer to strict rules in order not to endanger the state-controlled restructuring process, was thus achieved to a large extent. The discussion in France on the introduction of more flexible schemes such as leasing shows how economic necessities may overrule ambiguous legal provisions which, by creating administrative licences, negate any economic value.

The Germans were forced not to introduce more flexible schemes because of their costly overallocation and thus, they could easily convince the farmers that the application of the strict transfer rules was necessary. However, with leasing being allowed, the quota becomes a tradeable asset. Apparently, in practice, circumvention of the rules also occurred.

It is obvious that the main reason that no market of quotas emerged in two countries (France and Germany) but arose in another country (UK) was that the relatively efficient milk production structure in the UK (namely England, Wales and Scotland) enabled the producers to afford expansion by buying milk quotas and favouring a market-based system[937]. Because of a high demand for transfers in the UK, enforcing a strict control of transfers would be too expensive in the long run[938].

It is not quite clear, however, to what extent the emergence of markets or non-emergence of markets was caused by the different national legal orders including the national land law or only by the way the Community rules were incorporated and controlled. With respect to this, English lawyers have pointed out that the English transfer rules are a natural product of their land law which is completely different from the conti-

937 see Harvey, D. R., Milk quotas, p. 52

938 Amies, S. J., Transfer of Milk Quotas in England and Wales, in: Burrrel, A. (ed.), Milk Quotas in the European Community, p. 159

nental systems[939]. Thus the land law is blamed for the emergence of the quota market.

Because the quota market in the UK could obviously also emerge because of the use of short-term letting agreements, the crucial question is whether the transfer by short-term letting agreements and the use of the English "trick" of detaching the quotas from land by not using the land for milk production would also have been possible under the German and French quota and land law rules. In order to reach sufficient conclusions with regards to the legal reasons for the divergent practices and incorporations, the differences in the letting agreements that entail the transfer of reference quantities will be compared, including the rules governing the apportionment of quotas and limitations on the amount of quotas transferred.

II. Comparison of legal framework for transfers by letting agreements

1. UK

In the UK, all possible letting agreements such as grazing licences initially entailed the transfer of reference quantities. The reformed rules envisage the granting of an exclusive right of possession; any transfer by a mere grazing licence that does not constitute a tenancy is no longer possible. However, quotas are still transferred by tenancy agreements. This is also due to the fact that, since the beginning, the quota rules on the apportionment and limitations on the transferred amount in the UK have been favourable to the transfer of quotas and emergence of a market. The apportionment of quotas is left to negotiations of the parties and only in the second place, is it decided by an arbitrator. Thus, a relatively high number of reference quantities can be transferred with a few parcels of land. The guideline of 20, 000 litres is only an internal guideline of the Minister and not all transactions are controlled.

The question arises whether this transposition of the transfer rules is legal under the EEC law. However, the EEC rules are drafted very unclearly[940]. According to these, Member States may fix criteria for the apportionment either according to the areas used for milk production or

939 Crossley, G., (1985) 24 Farmland Market, p. 16
940 Art. 5 of Regulation 1371/84, O. J. 1984, L 132/11

according to other criteria. Member States have great discretion on the definition of the criteria for the apportionment of quotas[941]. The market of quotas that the European legislator tried to avoid was thus likely to emerge[942]. No rules in the UK have been passed on the size limit below or above which reference quantities have to be transferred to the national reserve[943]. But because the EEC rules on the national reserve are again entirely facultative, the UK rules are legal. The 5 ha limitation applying for grazing licences until 1989 apparently could not prevent the emergence of a quota market.

2. The British "trick" in Germany

Under the German agricultural tenancies law, extremely short-term leases (§ 581 BGB) which confer an exclusive right of possession can be a transaction entailing the transfer of reference quantities. However, it remains to be seen whether the British "trick" will work. No party agreement on the apportionment is possible under German Law, but the agricultural administrative agencies have to check and certify the transfer. Because in most parts of Germany (except in the North) all areas of a dairy unit are presumed by the courts and the administration to have been used for dairy production, the transferee would have to prove the contrary. In addition, if it is apparent that short-term leases which are not very economically useful are misused in order to transfer quotas, they would probably prevent this[944].

Moreover, until 1990, large numbers of reference quantities had to be released to the national reserve which would not have made the use of short-term agreements very profitable. Likewise, a minimum number of ha and maximum amount of reference quantities which are retained by the transferor are fixed.

Thus, the British "trick" could not easily be employed in Germany. The reason is not the diverse land law, but the transfer rules and the control by the authorities.

941 Gadbin, D., (1985) Revue de droit rural, No 138, p. 513
942 Lorvellec, L., (1987) Revue de droit rural, No 157, p. 410
943 except for the 5 ha limitation, see English Report
944 Riemann, A.; Streyl, H., (1986) top agrar, No 12, p. 29, see German report

3. The British "trick" in France

Under French law the granting of an exclusive right of possession would have been necessary if the transaction occurred by lease. The sale of grass would not have conferred exclusive possession. But even if short-term tenancy agreements other than the sale of grass which are not subject to a minimum length of tenancy, are used to transfer reference quantities, the English practice could not have been employed. If a parcel is not grazed by cows but by other animals, under the broad definition of the areas used for milk production, they would still be such areas, unless they were not forests, wasteland, ponds, fallow land and permanent cultures. To establish these cultures in a short period would, however, not have been practically possible and profitable. The transferor would not agree to any such transformation of the areas. Because the apportionment is not left to the parties but must be notified to the "préfet" who has been instructed to enforce the rules, any such misuse is also less likely.

In addition, any transfer below 20 ha would not have entailed a transfer of reference quantities because the quantities would have to be added to the national reserve. In France, a higher percentage of reference quantities is released to the national reserve than in Germany and the UK. Thus, speculations could be avoided and special producers be served.

The French transfer rules and its control thus did not allow for the British "trick".

4. Peculiarities of land law are irrelevant

To sum up, the main reason for the exorbitant use of short-term agreements in English law is that the agreements were not carried out and the performance of the agreements was not sufficiently controlled by the Ministry. In addition, the rules on the apportionment and size limits were favourable to transfers. Considering these facts, the peculiarities of English land law seem to be of minor importance for the transfer of reference quantities by letting agreements[945].

To sum up, the attitude towards the quota system clearly governed the incorporation of the transfer rules. In the French case, in contrast to the market-based British system, restructuring by administrative means was the goal. Germany, however, though deploring the necessity of increasing

945 at least as far as leases are concerned

the size of farms by quota transfers, in particular leasing, was forced for budgetary reasons to maintain a rigid system for quite a long time[946].

One interesting observation on the legal style of drafting rules in France and Germany can be made. In France, many terms of the transfer rules have been defined in the intitial "décret", e.g. areas for milk production. In addition, the transfer rules have been interpreted to a high extent by "circulaires" adressed to the administration and by responses of the Agricultural Minister given in Parliament. In Germany, however, the transfer rules remained ambiguous in many respects, in particular as far as areas for milk production were concerned. The judiciary had to interpret the transfer rules, which resulted in regionally different interpretations. The French transfer rules, however, did not take into account the diversity of the milk production structures[947].

D. Position of the tenant

As regards the position of the quitting tenant, the European legislator wanted to take into account the difficult economic and social situations of these tenants by giving them, under certain circumstances, the possibility of keeping all or part of the reference quantity attached to the quit premises if there is the intention to continue milk production. This provision is entirely facultative and is particularly relevant if tenants were in occupation of the holding in 1984. As underlined by the ECJ in the "Wachauf" case, this provision and the provisions on out-goer schemes give the Member States a sufficiently wide margin of appreciation to enable them to apply these rules in a manner consistent with the requirements of the protection of fundamental rights.

I. Reference quantities belong to nobody

Though the tenant's legal position is considerably different throughout the Member States, with a liberal agricultural tenancies law in Germany and a law ensuring the protection of the tenant in French and English law,

946 see Lukanow, J.; Nies, V., Die Milchgarantiemengen-Regelung, 3rd edition, p. 85
947 Lorvellec, L., (1987) Revue de droit rural, No 157, p. 416

the crucial issue in all Member States was how and if to guarantee a share of the reference quantities to the tenant. The legal construction offered by the Community legislator in order to ensure the protection of the tenant is left entirely to the Member States. No hint to the amount or even basis of the calculation or to whether the landlord has to consent to the cessation of milk production by the tenant is given. And what is worse, the ownership of the quota has not been clarified.

The Member States tried to define the tenants' rights to the reference quantities by resorting to their national property laws. In particular, they tried to clarify to whom the reference quantity belongs. But strikingly, in all three Member States, the reference quantity cannot be classified by the categories of the property law. They belong neither to the tenant nor to the landlord[948]. In fact, legally, reference quantities, as foreseen by the Commission, seem to be no more than a licence to commercialise a quantity of milk or milk products by the producer of a holding. This could have been an easy solution if the reference quantities had not gained a capital value, subject to offer and demand, at least when leased out.

For lack of any solutions in their property and agricultural tenancies law, the Member States enacted statutory provisions in order to divide either the reference quantities or their value between the landlord and tenant.

II. Thorough protection of the tenant in France

In France, tenants whose rural leases are about to expire have, only under exceptional circumstances, no right to renewal of the contract under similar conditions. In these cases the retention of reference quantities is foreseen. Even tenants who rented a holding after 1984, are considered, although they did not contribute by their labour to the "creation" of quotas in 1984.

This incorporation of Art. 7 (4) of Regulation 857/84 and the compensation rights granted to the tenants by national agricultural tenancies law and in out-goer schemes could give rise to the impression that, in France,

948 some French scholars, however, attribute the quotas either to the producer resp tenant or to the owner resp landlord, see French report. Nevertheless, these solutions are not very convincing given the French regulations incorporating the European milk quota Regulations

the producer is the "owner" of reference quantities. However, because the landlord might be compensated for quotas released to the national reserve by an out-going tenant if the rental value decreases, his share of the quota is also considered. The French rules on the tenant's rights seem to have recognized more than the transfer rules that the quota has an economic value in its own right. The application of the French rules casts no doubt on any infringement of the tenants' rights to property. Landlords' rights to property might even be impaired. The rules reflect clearly the strong position of the tenants under French law.

III. Protection of the tenant in parts of a holding in Germany

In Germany, the tenants whose rural leases are about to expire are in a difficult economic and social situation because the agricultural tenancies laws, as seen, does not entitle them to an extension of the lease under similar terms. Tenants who have to restitute parts of a holding which they rented before 1984 may thus retain reference quantities and in addition, under some schemes, they have not needed to ask for the landlord's consent if they want to take part in out-goer schemes. Tenants who rented a part of holdings after 1984 are also subject to the unfavourable rules of the agricultural tenancies laws. However, because they rent parcels to which reference quantities are attached, they are aware of the fact that they have to restitute the reference quantities. Moreover, this group of tenants did not contribute with their labour to the "creation" of the quota in 1984.

Tenants who have to restitute an entire holding rented before 1984 are not entitled to retain reference quantities and moreover, they have to ask for the landlord's consent if they want to participate in out-goer schemes. As shown, this casts doubt on whether Germany has applied the Communinity rules in accordance with fundamental rights. The Federal Adminstrative Court which held on the retention rules did not assume any infringement of fundamental rights.

The marginal importance of the lease of entire holdings in Germany might have prevented a protection of tenants farming entire holdings. Justification of the the rules by pointing to the prevailing production factor capital is not convincing.

IV. Division of quota value in the UK

No retention of quotas is foreseen because the rules on the termination of a lease do not result in economically and socially difficult situations for the tenant. Though the landlord's consent is required if a producer wants to give up milk production, the low number of British producers taking part in out-goer schemes seems to justify such a regulation.

A lacuna in the compensation rules of the Agricultural Holdings Act 1986 exists which gives rise to an infringement of the right to property of the group of tenants who quit their holdings between 1984 and 1986. Apart from this lacuna, however, the British legislator seems to have established the most convincing system because it attempts to weigh carefully the tenant's and the landlord's share of the quota by considering both the capital and labour value. Such a pragmatic solution means there is no need to define the ownership of the quota. This solution also recognizes the fact that the quotas became a tradeable asset in the UK.

To sum up, the incorporation of Art. 7 (4) of Regulation 857/84 was entirely different in the Member States. Economic and social difficulties do not arise in ali Member States to the same degree on the termination of a tenancy. The Community objective in this respect coincided with German needs.

Conclusions

A. Reasons for the differences in the implementation of the objectives

Summing up the differences which occurred in the implementation process pointed out in the last chapter, four reasons turned out to be decisive for the different fates of achievement or even failure of the objectives considered.

I. Discretionary rules and non-regulation as outcome of the policy-formulation phase

The first reason for differences in implementation of the Regulations is that the Council made non-uniform applications of the rules possible by the way the Regulation was drafted. In terms of the implementation research, deficiencies in the programme can be recognized. Both the Regulations establishing the super-levy system and its changes led to a more national policy in the dairy sector. The initial Regulations already allowed a certain discretion of the Member States such as the choice of the Formula and the reference year[949]. Member States, moreover, enjoy great discretion as far as the transfer rules (apportionment of quota and role of national reserve, relationship between landlord and tenant) are concerned. The amendments of the Regulations conceded even more discretions to the Member States such as the choice of whether to allow leasing arrangements or regional and national equalization[950]. Regional

949 s. Voß, R., Die Milchquoten als Gestaltungsmittel, in: Schwarze, J. (ed.), Der Gemeinsame Markt, p. 83; Gilardeau, J.-M., Juris-Classeur rural, vol. 4, Fasc. C-3, p. 8; Hairy, D.; Perraud, D., Crise et transformations de la politique laitière, in : Coulomb, P. et al (eds.), p. 88

950 Hairy, D.; Perraud, D., Crise et transformations de la politique laitière, in : Coulomb, P. et al (eds.), p. 88

and national equalization even caused a nationalisation of the quota[951] in that every Member State tried to make the optimum use of its national quantity. However, the intitial allocation of national guaranteed quantities to Member States was the first step to a nationalisation of quotas.

To sum up, the EEC legislator only set up general principles and it was left to the Member States how to implement these principles[952]. Several references for primary rulings have been made to the ECJ in order to clarify provisions[953]. In particular, the rules on the transfer of reference quantities contained several lacunae and no precise and clear provisions[954]. The provisions conerning the landlord and tenant law constitute, in fact, a non-regulation. The super-levy system does not present a uniform system, but is split into derogations, exceptions and discretions. Because some provisions can clearly be recognized as having been introduced under the pressure of one of the Member States considered, e.g. the protection of the tenant or the regional and national equalization, the outcoming Regulations prove again that the real actors in the CAP are the Member States.

The legal remedy if the Council exceeds its wide legislative discretionary power is Art. 173, 177 of the EEC Treaty. This discretionary power is limited firstly by the fundamental rights but also by the principle of non-discrimination. Both principles were held to have not been infringed by specific provisions of the Regulations, such as the choice between two Formulas or the non-regulation of the tenant's rights to the reference quantity. Because the EEC Regulations, despite their direct effect, consist of a set of discretionary and vague provisions, the ECJ in the context of milk quotas several times was forced to rule that implementing Member States may not infringe principles that originally had to be re-

951 Sorasio, D., (1985) Revue du marché commun, No 291, p. 543, 547; Gadbin, D., (1985) Revue de droit rural, No 138, p. 511

952 Dictionnaire Permanent Entreprise Agricole, Table analytique, Quotas laitiers (régime juridique), p. 786

953 examples are : interpretation of producer (Case C-341/89 Ballmann v Hauptzollamt Osnabrück [1991] E.C.R., p. I-40); of holding (Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] E.C.R., p. 2609 (2638); of exceptional event (Case C-177/90 Kühn v Landwirtschaftskammer Weser-Ems, (1992) Recht der internationalen Wirtschaft, p. 248); of choice of another reference year (Case 113/88 Leukhardt v Hauptzollamt Reutlingen [1989] E.C.R. p. 1991 (2014))

954 see Gadbin, D., (1985) Revue de droit rural, No 138, p. 513, Lorvellec, L., (1987) Revue de droit rural, No 157, p. 410, Blumann, C.; Lusson-Lerousseau, N., Juris-Classeur rural, vol. 3, Fasc. D-1, p. 9

spected by the Council[955], such as the fundamental rights. Since the uniform application of the Regulations cannot be ensured by mandatory provisions in the Regulations, the application of the provisions has to be subject to general principles.

II. Legal systems of the Member States; in particular structure of the implementers

Secondly, different implementations of the EEC Regulations are caused by the differences between the legal orders of the Member States. In the case of the implementation of the milk quota Regulations, this is striking as far as the administrative structure provided by semi-public producers' organizations is concerned. The MMB with its structure and monopoly for purchasing milk could provide an efficient administration of the reference quantities. In addition, their structure was in many respects economically favourable to the British producers, because of the equalization or transfer conditions. However, the MMB has so far only preserved its specific status as a compulsory producers' organization with the monopoly of purchasing fresh milk because of special Community Regulations. Its future status is uncertain.

The German administrative structure, by contrast, was overburdened with the super-levy sytem as the system did not fit the existing administrative structures.

The phenomenon of different administrative structures is not new, because in the CAP, though Member States may not any longer legislate on many subject matters in the market and price policy, the different administrative organizations, traditions and procedures and the autonomous competences of the Member States prevent a uniform application of Community legislation[956]. In particular, the different structures of the

955 Case C-267/88 - C-285/88 Wuidart et al v Laiterie coopérative eupenoise et al [1990] E.C.R., p. I-435 (I-486); Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] E.C.R., p. 2609 (2638); Case 196/88-198/88 Cornée et al v Coopérative agricole laitière de Loudéac "Copall" [1989] E.C.R. p. 2309 (2347); Case 201-201/85 Klensch v Secrétaire d'Etat à l'Agriculture et à la Viticulture [1986] E.C.R., p. 3477 (3507)

956 Schwarze, J., Europäisches Verwaltungsrecht, vol. 1, p. 439; p. 464; Blumann, C., (1988) Revue de droit rural, No 164, p. 251; Götz, V., (1986) Europarecht, p. 35 et seq

important public or half-public intervention agencies in some Member States lead to a more favourable treatment of their producers[957].

This fact results in a non-uniform implementation of the CAP under national law which in turn leads to different competitive situations in the Community[958]. A uniform procedure is especially important in the agricultural sector, because this sector is largely characterized by state intervention, on the one hand, granting aids or subsidies and, on the other hand, collecting levies of all kinds[959]. It could be asked whether, apart from the laborious way of harmonizing national laws according to Art. 100 of the EEC Treaty[960], other ways would have been possible when enacting the EEC milk quota Regulations to guarantee a more uniform application of the super-levy. The ECJ has recognized differences caused in implementation by different national administrative systems, but keeps to the national competences and proposes harmonization by way of Art. 100[961].

A completely different solution would have been to modify existing administrative structures by creating a European Agency with several branches in every country; a European Milk Agency which allocates the reference quantities to producers and is also the debtor of the levy[962]. But the Council with its large discretion was not obliged to make use of such a measure. Yet, it must be taken into account that the use of the administrative structure of Member States might be more efficient in the long run and guarantee the implementation according to Community law[963].

The position of the tenant is entirely different in the Member States also owing to the different structure of tenancy farming. The EEC legislator took this fact into account by granting a wide discretion to the Member States and by abstaining from any interference in the national agricultural tenancies laws, also with regard to Art. 222 of the EEC

957 Snyder, F. G., Law of the Common Agricultural Policy, p. 65 et seq.; Blumann, C., (1988) Revue de droit rural, No 164, p. 251

958 Nicolaysen, G., Europarecht I, p. 76

959 Boest, R., Die Agrarmärkte im Recht der EWG, p. 288

960 see Schwarze, J., Europäisches Verwaltungsrecht, vol. 1, p. 464

961 Case 205-215/82 Deutsche Milchkontor et al v Federal Republic of Germany [1983] E.C.R., p. 2633 (2667)

962 see, for example, the proposition to set up a European Environmental Agency, COM (86) 485 final

963 Götz, V., (1986) Europarecht, p. 35 et seq

Treaty. Demands for harmonization of the agricultural tenancies laws have been made several times[964]; however, the national reports and the results of the comparison qualify these demands as unrealistic wishes.

With the help of Community control, the ECJ, especially, is deemed to contribute to a uniform interpretation and application of the Community law in the different legal orders comprising different traditions, administrative organizations and judicial control[965]. This was proved in particular by the ruling of the ECJ in the "Wachauf" case. The reference to the fundamental rights as parts of the Community legislation that also must be considered by Member States applying Community law is a means of ensuring equal application of Community rules especially in a field with different legal concepts such as agricultural tenancies laws. The diversity of agricultural tenancies laws which is far from being harmonized thus causes few distorsions because the principle of fundamental rights overrides the implementation process. The ECJ has again proved to be an important engine for integration where different legal orders seem to prevent any equal application of Community law.

III. Socio-economic conditions of the subsector, in particular of the recipients

Thirdly, differences in implementation are due to socio-economic conditions of the subsector considered. The diversity of the European milk production structure had prevented any sufficient reduction of the milk surpluses until quotas were introduced. The super-levy system operating in the Member States could not deny this diversity. The efficient dairy structure in the UK, largely due to the favourable size of farms, is the reason for the emergence of a market of reference quantities. The draftsmen of the English transfer regulations took this into account. The Germans' fear of decreasing producers' prices caused them to overallocate reference quantities. The French intention to expand their dairy industry in order to compete with more efficient dairy producers in other Member States such as the UK, but also its concern over depopulated ar-

964 Lukanow, J., (1989) Agrarrecht, Supplement I/2, p. 14

965 Boest, R., Die Agrarmärkte im Recht der EWG, p. 292; Lasok, D.; Bridge, J. W., Law & Institutions of the European Communities, p. 318; Cartou, L., Communautés européennes, p. 189

eas and producers in special situations, created a strong national consensus that the administration be conferred with the pursuit of these contradicting policies. Socio-structural and economic conditions entirely determined the quota policy pursued and these diverse policies are enshrined in the Regulations. The whole fragmentary set of Regulations reflects the diverse dairy structure within the Member States. In the implementation process, moreover, it turned out that diverse economic structures within the Member States influences the implementation process.

IV. Infringement of Community law by implementers

Finally, differences in implementation occur, because Member States infringe the EEC Regulations in question, thus reducing the scope of the Regulations and endangering the uniform application of the provisions in the Community. This was the case with the German overallocation and the insufficient British control on whether changes of land had occurred. The legal remedy would have been Art. 169 of the EEC Treaty, but only in the case of the German overallocation, did the Commission initiate infringement procedures. The Commission abstained from the procedures because of German undertakings. In the case of the UK, British legislation was changed. But still, the lack of control by the Ministry demands the Commission's supervision. In the terms of the implementation research, deficiencies of the implementers, which were, in Germany, the agricultural administrative agencies and, in the UK, the supervising Ministry, can be held responsible for the infringement of the rules. In the UK, the recipients of administrative action, the producers, by circumventing the transfer rules contributed to the failure of the program, i.e. the rise of a milk quota market.

V. Evaluation of the reasons for differences in implementation

The reasons listed as having contributed to the success or failure of objectives enshrined in the Regulations are only related to the findings of this research and include a few factors determining implementation processes. Other factors influencing both the programme formulation phase, the implementation phase and the impacts of programmes such as the role

and interaction of interest groups or of the politico-administrative culture are possible, but for reasons of space could not be explored. Investigation into the socio-economic conditions of the recipients of administrative action, in this case the producers and the purchasers, proved to be of great value for understanding the incorporation and enforcement of the rules.

The question arises which of the differences that were shown as having occurred in the implementation of the milk quota Regulations mostly determined the implementation process.

The socio-economic conditions of the dairy sector seem to the the most important reasons for the differences in implementations. At least, they served as a general guideline of how to incorporate the facultative EEC Regulations and of how to control the application of the rules.

However, the role of the different legal orders should not be underestimated. The different administrative structure shaped the implementation processes in many respect, examples being the structure provided by the MMB, the problems of competence between agricultural and financial administration in Germany and the relationship between dairies and state administration in France. Last but not least, entirely diverse agricultural tenancies laws determined the incorporation of facultative provisions.

It is difficult to deduce which differences in the implementation of Community law in the Member States are due to specific features of the subsector concerned or to the problems of implementing Commmunity law in general in a Member State[966]. The socio-economic conditions of the dairy sector and the specific structures of both the implementers and recipients of administrative action on this sector have been shown as determining the implementation of the EEC milk quota Regulations to a large extent. Any general remarks on how implementation processes proceed in the Member States considered, thus, cannot be made on the basis of one case study concerning such a specific sector.

Nevertheless, the case study allowed for some specific general observations such as the style of incorporating Community rules in Germany and France or the different administrative structure in the three Member States considered with regard to the agricultural sector in general. As far as land law is concerned it turned out that the differences between Common law and Romano-Germanic law was not decisive for the imple-

966 see Ziller, J., The Implementation of European Community Policies, in: Siedentopf, H.; Ziller, J. (eds.), Making European Policies Work, vol. 1, p. 142

mentation of Community law[967]. Since striking differences in land law such as the law of trusts exist between the three Member States this statement is again limited to the specific Regulation considered.

Though the Commission controlled the two most striking infringements of the quota system - the overallocation in Germany and the transfer rules in the UK - it could not enforce the Regulations. In the case of Germany, political reasons might have been important and in the case of the UK, the transfers are practically uncontrollable by the Commission.

B. Renationalisation or regionalisation of the CAP?

Having scrutinized the differences that occurred in the implementation of the milk quota Regulations and following an attempt to define the reasons therof, the milk quota Regulations appear as a fragmentary set of national policies pursued, only connected by vague principles. In this context, the phenomenon of the renationalisation of the policy on the dairy sector suggests itself[968]. Renationalisation means the different treatment of the producers according to their nationality by leaving discretions and making concessions to Member States[969]. In the CAP, renationalisation occurs in sectors that have been characterized by a common policy such as the market and price policy. A slight trend toward renationalisation has existed since the late 1960s, and the potential of this trend was strengthened with the introduction of the Monetary Compensatory Amounts system[970]. The structural policy, in particular, however, has never been anything other than a national policy[971]. Other areas of policy not covered by a common policy are the social security

967 at least as far as letting agreements are concerned

968 Sorasio, D., (1985) Revue du marché commun, No 291, p. 547; Kummer, H.-W., Art. 40 EWGV, in: von der Groeben, H.; Thiesing, J.; Ehlermann, C.-D. (eds.), Kommentar zum EWG-Vertrag, Annotation 51

969 see Kummer, H.-W., Art. 40 EWGV, in: von der Groeben, H.; Thiesing, J.; Ehlermann, C.-D. (eds.), Kommentar zum EWG-Vertrag, Annotation 49 et seq

970 Voß, R., Die Milchquoten als Gestaltungsmittel, in: Schwarze, J. (ed.), Der Gemeinsame Markt, p. 83; Feld, J. W., The Two-tier Policy Making in the EC, in: Hurwitz, L. (ed.), Contemporary Perspectives on European Integration, p. 128, 138, 147

971 Smith, J.; Clarisse, Y., The crisis in European Agriculture, p. 109

and tax system[972] and the agricultural tenancies laws. In these sectors, renationalisation cannot be deplored.

As regards the milk quota Regulations, the discretion left to the Member States both initially and during their application apparently caused the renationalisation of the market policy in the dairy sector[973]. A different treatment of Member States, however, may be justified in the view of diverse national production structures which, according to Art. 39 (2) of the EEC Treaty, have to be taken into account[974]. Because the milk quota system is closely linked to non-common fields of agricultural policies (structural policy, agricultural tenancies laws) a certain nationalisation was apparently unavoidable. From the legal point of view, the renationalisation is unquestionable provided the principle of prohibition of discrimination has not been infringed; such infringement would endanger the unity of the market[975].

Thus, the so-called "renationalisation" might be politically deplorable because the nationalisation of the quota is artificial, due to national borders and interests rather than to socio-economic realities.

The alternative to the renationalisation of the CAP is the regionalisation which is also being discussed in the CAP[976], especially in the context of environmental issues[977]. The diverse milk production structures would allow a regionalisation of the reference quantities. This is illustrated by the French and German examples, both countries with entirely diverse milk production conditions within their borders[978]. German courts interpreted regulations differently because of regional differences (e.g. "areas used for milk production" or "place of a cow"[979]). The French restructuring policy was largely regionalised. In fact, a certain regionalisation was even envisaged by the initial Regulations allowing different Formulas

972 Pearce, J., The Common Agricultural Policy, in: Wallace, H.; Wallace, W.; Webb, C. (eds.), Policy Making in the European Community, p. 154

973 Sorasio, D., (1985) Revue du marché commun, No 291, p. 547

974 Sorasio, D., (1985) Revue du marché commun, No 291, p. 547

975 see Case C-267/88 - C-285/88 Wuidart et al v Laiterie coopérative eupenoise et al [1990] E.C.R., p. I-435 (I-449)

976 see Gallus, G., German Secretary of State of the Federal Ministry of Agriculture, Agra-Europe 45/92, Europa-Nachrichten, p. 13

977 set-aside programmes, see for example in "Baden-Würtemberg", Agra-Europe 25/91, Länderberichte, p. 5

978 this is also true for the UK to a certain degree, see Northern Ireland

979 see BVerwG, (1991) Neue Zeitschrift für Verwaltungsrecht, Rechtsprechungs-Report, p. 627

to be implemented on the territory of the Member States. The ECJ in the case "Cornée" approved the French practice of re-allocating reference quantities within a region, and denied an infringement of Art. 40 (3) of the EEC Treaty by the implementing French legislator[980].

The allocation of reference quantities to regions and the declaration of these as freely tradeable within the region, detached from the holding, could have been envisaged. Sales would have been restricted to regions, supervised by authorities and speculative prices might not have arisen if certain safeguards like a maximum amount were introduced. The levy would only be payable if the regional quota was in excess. A regional authority would administer the rules. The size of the regions would depend on the discretion of the Member States; however, there must be a geographical unity and similar structural conditions. If the quotas were regionalised, neither the problems of the transfer rules nor of the different Formulas would occur to such an extent[981]. And, more importantly, the landlord and tenant problems would be mitigated because the reference quantity is not attached to a holding but allocated to a producer.

The results gained from this comparison only leave the choice of considering the diversity of the EEC regions in the dairy sector in more depth.

980 Case 196/88-198/88 Cornée et al v Coopérative agricole laitière de Loudéac "Copall" [1989] E.C.R. p. 2309 (2347); see fourth chapter

981 see also proposition by Wienberg, D.; Höller, T., (1986) Berichte über Landwirtschaft, p. 206, who want to introduce a region-based system as it is practised in Canada

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